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No. 96-957-CSX
Status: GRANTED

Title: Melvin Jefferson, Individually and as Administrator
of the Estate of Alberta K. Jefferson, Deceased, et
al., Petitioners

Docketed:
December 16, 1996

v.
City of Tarrant, Alabama

Court: Supreme Court of Alabama

Counsel for petitioner: Pantazis, Dennis G.

Counsel for respondent: Morse, Wayne, Roberts Jr., John G.

NOTE: See 29.2 re dkt dt. 121696 Counsel ADM. 121696
Sup. Ct. AL confirmed reh. den.

Entry	Date	Note	Proceedings and Orders
1	Nov 27 1996	G	Petition for writ of certiorari filed. (Response due January 15, 1997)
2	Jan 9 1997		Brief of respondent City of Tarrant in opposition filed.
3	Jan 22 1997		DISTRIBUTED. February 14, 1997 (Page 29)
4	Feb 4 1997	X	Reply brief of petitioners Melvin Jefferson, et al. filed.
5	Feb 12 1997		Record requested -- AS.
6	Feb 26 1997		Record filed.
	*		Record proceedings Supreme Court of Alabama and Circuit Court, Jefferson County, Alabama.
7	Mar 5 1997		REDISTRIBUTED. March 21, 1997 (Page 1)
9	Mar 24 1997		REDISTRIBUTED. March 26, 1997 (Page 12)
10	Mar 31 1997		Petition GRANTED. Limited to the following question: "Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Section 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. Section 1983?" SET FOR ARGUMENT November 4, 1997. *****
11	May 15 1997		Joint appendix filed.
12	May 15 1997		Brief of petitioners Melvin Jefferson, et al. filed.
14	Jun 3 1997		Order extending time to file brief of respondent on the merits until July 16, 1997.
15	Jul 16 1997		Brief of respondent City of Tarrant, Alabama filed.
16	Aug 15 1997		Reply brief of petitioners Melvin Jefferson, et al. filed.
17	Sep 16 1997		CIRCULATED.
18	Sep 17 1997		Record filed.
	*		Certified record proceedings Supreme Court of Alabama and Circuit Court, Jefferson County, Alabama.
19	Nov 4 1997		ARGUED.

96 957 NOV 27 1996

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Case No. _____

IN THE

Supreme Court of the United States

TERM.

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners.

vs.

CITY OF TARRANT, ALABAMA.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ALABAMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a claim for money damages against a municipality in the State of Alabama, brought pursuant to 42 U.S.C. §1983, will lie where death has resulted from the constitutional deprivation complained of. The issue presents itself because 42 U.S.C. §1983 does not contain a survivorship provision. This "gap" is closed by 42 U.S.C. §1988 which states that where the civil rights statutes are deficient in providing a remedy, "The common law, as modified and changed by the Constitution and statutes of the state wherein the Court having jurisdiction of such civil or criminal case is held, *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall extend to and govern . . ." 42 U.S.C. §1988.

In a case brought in Alabama, the survivorship provision that becomes operative pursuant to §1988 is the Alabama Wrongful Death Act. Ala. Code §6-5-410 (1975). The Alabama Wrongful Death Act has been held to provide for the recovery of punitive damages only. *See e.g.*, *King v. National Spa and Pool*, 607 So. 2d 1241, 1246 (Ala. 1992).

This Court, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), has held that municipalities are immune from punitive damages. When presented with these precedents, the Alabama Supreme Court, following *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), held that no §1983 claim survives, and plaintiffs proceeding in a death case against a municipality are left with a state law cause of action that limits damages to \$100,000.00 by Ala. Code §11-93-2 (1975), and that does not provide for the fees and expenses available to a prevailing §1983 litigant. The Alabama Supreme Court's decision presents the following issue: Is the application of the Alabama Wrongful Death Statute in such a way that it would bar §1983 actions against a municipality in any case where death is

the result of the constitutional deprivation, leaving litigants with only a severely limited state law claim inconsistent with the Constitution and laws of the United States?

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IN THE
Supreme Court Of The United States
____ TERM, ____

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Albert K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

v.
CITY OF TARRANT, ALABAMA,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA**

Melvin Jefferson, individually and as the Administrator of the Estate of Alberta K. Jefferson; Leon Jefferson; and Benjamin Jefferson respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINION BELOW

The opinion of the Supreme Court of Alabama (App. A-I) is reported as *Jefferson v. City of Tarrant, Ala.*, ___ So. 2d ___, 1996 Ala. Lexis 185 (Ala. Sup. Ct. 1996). The opinion of the Circuit Court for Jefferson County, Alabama is unreported.

JURISDICTION

The Alabama Supreme Court released its opinion on July 12, 1996. Rehearing was denied by the Alabama Supreme Court on August 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

The statutes involved in this appeal are 42 U.S.C. §1983, 42 U.S.C. §1988, and Ala. Code §6-5-410 (1975), which are reproduced at Appendix A-II.

STATEMENT OF THE CASE

Petitioners, Melvin Jefferson, individually and as the Administrator of the Estate of Alberta K. Jefferson, Leon Jefferson, and Benjamin Jefferson, sued the City of Tarrant, Alabama in the Circuit Court for Jefferson County, Alabama. The Complaint was filed on or about June 20, 1994.

A. *The Underlying Action*

The action arises out of a fire on December 4, 1993 at 6017 57th Street North, Tarrant City, Alabama, which was

the residence of plaintiff Benjamin Jefferson, and Alberta K. Jefferson, the decedent.

Mrs. Jefferson was an elderly black woman who had had both of her legs amputated as the result of diabetes, and was only able to get about by the use of a wheelchair. The fire resulted in the death of Alberta K. Jefferson. The evidence before the trial court was that the firefighters were aware that this house was located in a predominantly black section of the City of Tarrant, Alabama. The fire resulted in the death of Alberta K. Jefferson. The City of Tarrant Fire Department personnel, including the acting chief, were aware of the neighborhoods in their territory that were predominantly black, and which were predominantly white. The firefighters described the neighborhood where this fire took place as not typical for Tarrant, and "a little bit more unkempt".

The evidence before the trial court was that the City of Tarrant Fire Department did not treat black and white sections of town equally. This disparity of treatment between the predominantly black sections of town and the predominantly white sections of town, and the death of Alberta K. Jefferson, led to the filing of a claim under 42 U.S.C. §1983 for the denial of equal protection of the laws to black citizens. Plaintiffs' claim is that a pattern and custom of denying protective services to disfavored minorities exists in the City of Tarrant, Alabama, and led to the death of Mrs. Jefferson. Such denials are generally redressable by §1983 actions. *See, Moody v. City of Hoboken*, 758 F. Supp. 1027, 1031 (D.N.J. 1991), citing *DeShaney v. Winnebago County*, 109 S.Ct. 998 (1989) (State "may not . . . selectively deny its protective services to certain disfavored minorities without violating the equal protection clause.")

B. Proceedings Below

This lawsuit was initiated by the filing of a Complaint on June 20, 1994. One of the plaintiffs, Melvin Jefferson, brought the action both individually, and as the personal representative of the decedent, Alberta K. Jefferson. Melvin Jefferson, as the representative of Alberta K. Jefferson's estate, brought state law claims under Ala. Code §6-5-410 (1975), the Alabama Wrongful Death Act, and 42 U.S.C. §1983. Leon and Benjamin Jefferson, and Melvin Jefferson in his individual capacity, brought claims for intentional infliction of emotional distress, and for the Alabama common law tort of outrage.

The Circuit Court for Jefferson County, Alabama, considered a motion for summary judgment and a motion for judgment on the pleadings, together with evidentiary exhibits. This appeal arises out of the Circuit Court for Jefferson County, Alabama's ruling, and the Supreme Court of Alabama's reversal thereof, on the legal issue presented by the City of Tarrant, Alabama's Motion for Judgment on the Pleadings.

The trial court denied the City of Tarrant's Motion for Judgment on the Pleadings, but entered a Statement of the Circuit Court Judge certifying that the interlocutory order denying the Judgment on the Pleadings for the City of Tarrant, Alabama involved a controlling question of law suitable for immediate appeal pursuant to Rule 5 of the Alabama Rules of Appellate Procedure. The City of Tarrant, Alabama filed a petition for permission to appeal from the trial court's Order on July 17, 1995. On August 23, 1995, the Alabama Supreme Court entered an order permitting the City of Tarrant, Alabama to appeal from the interlocutory order entered on July 17, 1995.

On July 13, 1996, the Alabama Supreme Court reversed the ruling of the Circuit Court for Jefferson County, Alabama, and remanded the case for further

proceedings, holding that an action against a municipality under 42 U.S.C. §1983 could not lie where a death resulted from the wrong complained of by the plaintiff. The Alabama Supreme Court relied upon *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), cert. denied 467 U.S. 1211 (1984), in making its decision, and specifically rejected the interpretation holding in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), which held that the application of the Alabama Wrongful Death Statute in *Carter* was inconsistent with the underlying 42 U.S.C. §1983. The Court denied a timely filed motion for rehearing on August 30, 1996.

REASONS FOR GRANTING THE PETITION

A. The Alabama Supreme Court, In Upholding *Carter v. City of Birmingham*, Has Applied The Alabama Wrongful Death Act, Contrary To 42 U.S.C. §1988, In A Manner That Is Inconsistent With The Constitution And Laws Of The United States, And Violates The Supremacy Clause Of The Constitution.

The Alabama Supreme Court, in following *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), has applied the Alabama Wrongful Death Act to a §1983 claim in a manner that is inconsistent with the Constitution and laws of the United States. In so doing, the Alabama Supreme Court not only has ignored the express provisions of 42 U.S.C. §1988, the provision that refers §1983 litigants to the Alabama Wrongful Death Act, but it has ignored the dictate of the U. S. Supreme Court that a federal right cannot be defeated by forms of local practice. *Felder v. Casey*, 108 S.Ct. 2302, 2314 (1988).

The civil rights statutes do not contain a survivorship provision. However, the remedy for this deficiency is provided by 42 U.S.C. §1988. This section provides that

where the federal civil rights laws are not suitable to carry into effect the provisions contained therein, the relevant state law will apply. However, the applicability of state procedural vehicles for bringing §1983 actions is specifically limited by §1988:

The jurisdiction . . . shall be exercised and enforced in conformity with the laws of the United States, so long as such laws are suitable to carry the same into effect; but in all cases where they [federal civil rights statutes] are not adapted to the object, or are deficient in the provision necessary to furnish civil remedies and punish offenses against the law, the common law . . . *so far as the same are not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern said courts in the trial and disposition of the cause . . .

42 U.S.C. §1988 (emphasis added).

The Alabama Supreme Court in this case, following *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), continues to apply the Alabama Wrongful Death Act in §1983 claims against municipalities in such a manner that no §1983 action may be brought. This application has granted Alabama municipalities immunity from §1983 actions in death cases.

Only one federal court has directly decided the issue presented by the case at bar. The U. S. District Court for the Southern District of Alabama in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), directly repudiated the *Carter* analysis upon which the Alabama Supreme Court's decision in this case rests. In *Weeks*, the Court explained why the application of Ala. Code §6-5-410 (1975) under *Carter* is "inconsistent with the Constitution and laws of the United States." *Weeks*, 649 F. Supp. at 1304.

To begin its analysis, the *Weeks* Court cited *Robertson v. Wegman*, 98 S.Ct. 1991 (1978) for the test to be used in

determining whether the application of a state statute is inconsistent with the Constitution and laws of the United States:

Correct analysis requires a determination of whether the application of a state statute in a particular case has the result not merely of causing the plaintiff's claim to fail, but also of undermining the policies of compensation and deterrence underlying §1983.

Weeks, 649 F. Supp. at 1305, citing *Robertson, supra*.

The opinion of the Alabama Supreme Court, citing *Carter*, holds that because the Alabama Wrongful Death Act provides for punitive damages only, and because the U. S. Supreme Court held in *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981) that municipalities are immune from punitive damages, a §1983 claim cannot lie against a municipality where the constitutional injury results in death. This holding, however, ignores the clear mandate of 42 U.S.C. §1988 which puts the Alabama Wrongful Death Act at issue in the first place. That is, that state provisions will only be relied upon so far as the same are not inconsistent with the Constitution and laws of the United States. Moreover, the effect of *Carter* and the Alabama Supreme Court's decision in this case, is to deny a federal cause of action because the constitutional wrong resulted in death as opposed to a lesser injury.

The policies underlying §1983 claims, according to *Robertson*, are "compensation of persons injured by deprivation of federal rights, and prevention of abuses of power by those acting under color of state law." *Robertson*, 98 S.Ct. at 1995. The Alabama Supreme Court's decision in this case is not consistent with the purposes of §1983. The *Weeks* Court, in words more elegant than Petitioner could compose, succinctly stated why the *Carter* application is inconsistent with federal law:

A strict application of the Alabama wrongful death statute in cases involving municipal or county liability cannot be justified under the Robertson Court's analysis. The Alabama statute provides for the recovery only of punitive damages, but municipalities and counties are immune from these damages in actions under §1983. Thus, the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages, at least in cases where the decedent's death resulted from their wrongful acts. Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under §1983 for acts that cause deprivations of constitutional rights as long as the victims die. The policy of deterrence of official misconduct that underlines §1983 would obviously be severely undermined if the Alabama wrongful death statute is applied in a way that eliminates municipal and county liability in such cases. Moreover, §1983's policy of compensating the victims of official misconduct would also be undermined.

Weeks, 649 F. Supp. at 1305.

Mindful of the two goals of compensation and deterrence in a §1983 claim, *See, Hardin v. Straub*, 490 U.S. 536, 539 (1989) (Chief goals of §1983 action are compensation and deterrence); *Board of Regents of Univ. of New York v. Tomanvo*, 446 U.S. 478, 488 (1980); *Owen v. City of Independence*, 445 U.S. 622, 651 (1980), the Weeks Court held that the Alabama Wrongful Death Act should not be applied in such a way that a plaintiff's §1983 action evaporates when life evaporates.

This Court therefore holds that, in actions under §1983, where the liability of a municipality, county, or other local governmental entity is at

issue, and where the alleged unconstitutional acts result in the death of the victim, the Alabama wrongful death act should be applied only to the extent that the decedent's action is permitted to survive. The wrongful death statute should not be held to foreclose the recovery of compensatory damages against the governmental entity in question, for such a result would be inconsistent with the policies underlying §1983.

Id. Petitioner seeks only a decision from this Court bringing the Alabama Supreme Court in line with what was obvious to the Weeks Court, and has been obvious to courts across the country. *See, infra.* A decision that would result in the complete immunization of governmental entities in Alabama from damages where those entities' wrongful acts cause death provides neither compensation for the victims of constitutional wrongs, nor deterrence to those who would commit them.

1. Courts Have Consistently Held That State Law Damage Restrictions Such As Alabama's Wrongful Death Act Are To Be Disregarded When They Conflict With §1983 Policy.

The analysis of the Weeks Court is well accepted across the nation as a proper application of the *Robertson* test. For example, in *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir.), cert. denied, 464 U.S. 961 (1983), the Second Circuit held that the application of a state provision such as that adopted by the Alabama Supreme Court in this case is inconsistent with the Constitution and laws of the United States. In *McFadden*, a §1983 action was brought against a police officer arising out of the shooting of the plaintiff's decedent by the officer. The jury awarded punitive damages to the plaintiff. The defendant appealed, arguing that punitive damages in such cases were barred by a New York statute preventing the survival of claims

for punitive damages after the death of plaintiff's decedent. The Second Circuit, relying on the *Robertson* analysis, stated the following:

We have no doubt that limitations in a state survival statute have no application to a section 1983 suit brought to redress a denial of rights that caused the decedent's death. [citations omitted] To whatever extent section 1988 makes state law applicable to section 1983 actions, it does not require deference to a survival statute that would bar or limit the remedies available under section 1983 for unconstitutional conduct that causes death. State law that would preclude a claim for punitive damages in a case like the present one is "manifestly inconsistent" with federal law within the meaning of section 1988.

McFadden, 710 F.2d at 911. Similarly, the Alabama Supreme Court holding that would immunize municipalities from §1983 liability in death cases is "manifestly inconsistent" with federal law.

The following decisions similarly show that state law restrictions will not be upheld when the effect is to destroy a federal cause of action. *Heath v. City of Hialeah*, 560 F. Supp. 840 (S.D. Fla. 1983) (refusing to apply Florida statute's ban on the recovery of decedent's damages); *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982) (refusing to apply restrictions on recoverable damages in Colorado statutes); *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345 (E.D. Va. 1981) (refusing to apply the Virginia wrongful death statute's bar on recovery of decedent's damages or punitive damages).

Lastly, in *Williams v. City of Oakland*, 915 F. Supp. 1074 (N.D. Cal. 1996) a §1983 action was brought against the City of Oakland and its police officers arising out of an

unlawful search and seizure. After the lawsuit was filed, the plaintiff died of unrelated causes. The question before the Court was whether pain and suffering damages, which are recoverable in a §1983 action, would abate with the death of the decedent pursuant to California statute. The *Williams* Court, citing *Robertson*, *supra*, stated that a denial of pain and suffering damages "would strike at the very heart of a section 1983 action. *Williams*, 915 F. Supp. at 1077, quoting *Guyton v. Phillips*, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981). The Court held that application of the California statute in such a way as to take away a key component of the damages for a §1983 action would be inconsistent with the laws and Constitution of the United States. The Alabama Supreme Court, however, continues to apply the Alabama Wrongful Death Act in a way that is inconsistent with the underlying purposes of a §1983 action, and in a manner consistently rejected across the country. The only way to bring the Alabama Supreme Court into line with the well accepted federal authority in this area is a grant of Certiorari in this case.

The holding in *Weeks*, *supra*, has affirmatively adopted the correct approach in applying the Alabama Wrongful Death Act to a §1983 action. Moreover, the Eleventh Circuit has recognized that *Carter* is not a correct expression of federal law. In *Gilmere v. City of Atlanta*, 846 F.2d 734 (11th Cir. 1989), the Court recognized that the application of Alabama's Wrongful Death Act in the manner it has been applied by *Carter* is inconsistent with the laws and Constitution of the United States.

The Alabama Wrongful Death Statute, Ala. Code §6-5-410, provides only for assessment of punitive damages. *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), cert denied, 467 U.S. 1211, 104 S.Ct. 2401 (1984). Because this

statute is inconsistent with the rule that damages in §1983 actions are to be compensatory, reliance on the Alabama wrongful death statute would not be proper under §1988. *See, Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986).

Gilmere, 564 F.2d at 740, n.7.¹ It is clear that the federal courts passing on the issue have seen the inconsistency in the application of the Alabama Wrongful Death Act to §1983 actions under *Carter*.

2. U. S. Supreme Court Authority Shows That The Application Of The Alabama Wrongful Death Act Urged By Defendant Is Inconsistent With The Purposes Of §1983.

The reason that federal courts have consistently rejected *Carter* is that, while state courts may entertain federal §1983 actions, local forms of practice cannot defeat established federal rights. *Felder v. Casey*, 108 S.Ct. 2302 (1988). In *Felder*, a motion to dismiss was granted a municipal defendant on a §1983 claim because the plaintiff failed to comply with Wisconsin's notice-of-claim statute. The Court held that the notice-of-claim statute could not act as a bar to a federal §1983 action. In reaching its decision the *Felder* Court held:

¹The Alabama Supreme Court's utter disdain for the proper application of the Alabama Wrongful Death Act in this context is further illustrated by its failure to follow its own precedent, which would lead it to follow *Gilmere* and *Weeks* as binding federal appellate court precedent on a federal issue. In *Central of Georgia Ruy Co. v. Ramsey*, 275 Ala. 7, 151 So. 2d 725 (1962), the Alabama Supreme Court held that "decisions of federal courts, construing federal statutes, in the absence of a contrary holding by the Supreme Court of the United States, are binding on us. *Central Ruy of Ga.*, 151 So. 2d at 730, citing *Dickey v. West Boylston Mfg. Co.*, 251 Ala. 19, 36 So. 2d 106 (1948). However, the same Court has refused to follow the holding in *Gilmere*, directly rejecting the *Carter* analysis, and the holding in *McFadden* showing that the *Carter* analysis is faulty.

Just as federal courts are constitutionally obligated to apply state law to state claims, *see Erie B. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such a manner that all the substantial rights under controlling federal law are protected."

Felder, 108 S.Ct. at 2313-14, citing *Garrett v. Moore-McCormack Co.*, 63 S.Ct. 246, 251 (1942). Similarly, if the Alabama Wrongful Death Act is applied as Defendant urges, the substantive rights of equal protection denied Mrs. Jefferson cannot be remediated.

The *Felder* Court, in refusing to allow a state notice of claim statute to abrogate an otherwise proper §1983 claim, realized the supremacy of the federally created right in such cases.

Thus, §1983 provides "a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation," *Mitchum v. Foster*, 407 U.S. 225, 239, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972), and is to be accorded "a sweep as broad as its language." *United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267 (1966).

* * *

Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy.

Felder, 108 S.Ct. at 2307. The Alabama Supreme Court has refused to follow this mandate. Both *Carter* and the

present case illustrate its utter disdain for the principle of supremacy articulated in *Felder*.

3. The Alabama Supreme Court's Decisions In Carter And The Present Case Do Not Offer An Adequate Remedy For The Victims Of Official Misconduct.

The opinion of the Alabama Supreme Court in this case states, quoting *Carter*, that the purpose of §1983 liability is not defeated because state law recognizes an analogous cause of action under the Alabama Wrongful Death Act. This is simply not true.

First, the Alabama Wrongful Death Act claim in this case is wholly inadequate. It is inadequate because recovery on such state law claims in Alabama is capped at \$100,000.00 by Ala. Code §11-93-2 (1975). Second, the provision of a similar state law cause of action in no way replaces the federal right to bring an action for redress of constitutional wrongs under §1983. In *Monroe v. Hape*, 81 S.Ct. 473 (1961), a police officer against whom a §1983 action was brought argued that said action was unnecessary because of a similar state action. The Court rejected this argument, stating:

It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy . . .

Monroe, 81 S.Ct. at 482.

Similarly, the Court in *Williams*, *supra*, relying on *Carey v. Piphus*, 435 U.S. 245 (1978), recognized that a state law tort action may not be adequate to remediate a constitutional deprivation. In *Williams*, the issue was whether a California statute cutting off pain and suffering damages at death would be applied to a §1983 action. In holding such an application to be inconsistent with the Constitution and laws of the United States, the Court held "to

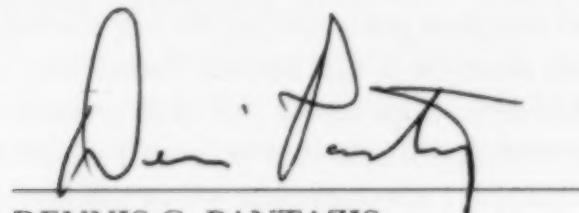
deny pain and suffering damages would strike at the very heart of a section 1983 action . . . absent such a remedy, the section 1983 action amounts to little more than a tort claim." *Williams*, 918 F. Supp. at 1077, quoting *Guyton v. Phillips*, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981). Simply put, just as the *Williams* Court found it to be inconsistent to disallow pain and suffering damages in a §1983 action because of a California limitation on tort actions, the Alabama Supreme Court's decisions that totally eliminate §1983 actions in death cases — leaving litigants with only a capped tort remedy — is wholly inconsistent with the purposes of a §1983 action. See, *Carey*, 435 U.S. at 258 (purpose of §1983 action defeated if injuries caused are uncompensated due to common law restrictions of "analogous" state action).

CONCLUSION

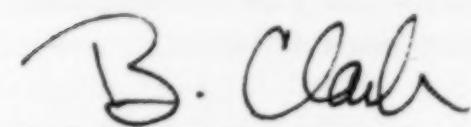
The Alabama Supreme Court has simply refused to properly apply §1988 to death actions brought on §1983 claims against public entities. The Alabama Supreme Court's application of the Alabama Wrongful Death Act in a way that totally insulates municipalities from §1983 liability when death results from the constitutional deprivation, rather than from a lesser injury, is manifestly inconsistent with the purposes of underlying a §1983 action. This Court has held that the Supremacy Clause dictates that the application of state restrictions in §1983 actions goes only so far as such restrictions do not conflict with federally granted rights and actions. Courts around the Country have held that where the application of a state statute would severely restrict such rights, the state law restrictions must yield. This petitioner merely asks this Court to bring Alabama into line with these decisions, and to put an end to the Alabama Supreme

Court's elimination of §1983 death claims due to state procedural rules which, under the federal decisions cited herein, must yield.

RESPECTFULLY SUBMITTED,



DENNIS G. PANTAZIS
Counsel of Record



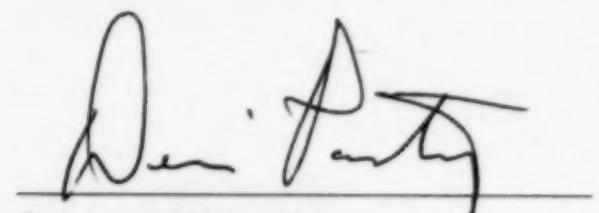
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CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing have been served by United States mail, postage prepaid and properly addressed on counsel for the Respondents, John W. Clark, Jr. and Wayne Morse, CLARK & SCOTT, P.C., 3500 Blue Lake Drive, Suite 350, Birmingham, Alabama 35243-1907.

This the 21 day of November, 1996.



Dennis G. Pantazis

APPENDIX

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1996

1941573

City of Tarrant, Alabama

v.

Melvin Jefferson, et al.

Appeal from Jefferson Circuit Court
(CV-94-4523)

MADDOX, JUSTICE:

Pursuant to Rule 3, Ala.R.App.P., we permitted the defendant City of Tarrant to appeal from an interlocutory order in which the trial court held that the question of the survivability of Alberta K. Jefferson's cause of action for compensatory damages under 42 U.S.C. § 1983 was governed by federal common law rather than by Alabama's Wrongful Death Act, § 6-5-410, Ala. Code 1975. The plaintiff Melvin Jefferson, Alberta's son, sues individually and as a personal representative for the estate of the decedent. He alleges that Tarrant firefighters, based upon a policy of selectively denying fire protection to minorities, purposefully refused to attempt to rescue and revive Alberta.

Facts

Melvin Jefferson claims that city firefighters violated Alberta Jefferson's civil rights, specifically that they intentionally, negligently, wantonly, or carelessly failed to attempt to extricate her from her burning house and thereby caused her wrongful death, a death that would be actionable under § 6-5-410, Ala. Code 1975. The defendant city moved for a judgment on the pleadings, specifically as to those claims seeking compensatory damages under 42 U.S.C. § 1983; the court denied the city's motion, and this Court permitted an appeal from the denial. The defendant city maintains that the question of the survivability of Alberta Jefferson's § 1983 cause of action against the municipality is governed by Alabama law rather than federal common law, and that the trial judge erred in holding otherwise when he denied the city's motion for a judgment on the pleadings.

Issue

Is the question of the survivability of Alberta Jefferson's cause of action for compensatory damages under 42 U.S.C. § 1983 governed by federal common law or by reference to the Alabama Wrongful Death Act. This Court addressed this same issue in *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983) cert. denied, 467 U.S. 1211 (1984). Also see, *Blair v. City of Rainbow City*, 542 So. 2d 275 (Ala. 1989). This issue arises because no federal statute provides for the survivability of § 1983 claims; moreover, federal law prohibits a § 1983 award of punitive damages against a municipality¹ and compensatory damages are not available under Alabama's Wrongful Death Act, which allows an award of punitive damages only.²

¹ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

² See, e.g., *Atkins v. Lee*, 603 So. 2d 937 (Ala. 1992).

Analysis

The trial court was aware of this Court's holding in *Carter*, but held that *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), had, in effect, overruled *Carter*.

We have examined the principles of law stated in *Weeks* and have also re-examined the principles of law stated in *Carter*. We conclude that *Carter* correctly denied this issue. We should also note that the Supreme Court of the United States denied certiorari review of the *Carter* decision.

The rationale of *Weeks* appears to be that the application of § 6-5-410 in § 1983 actions is inconsistent with the Constitution and laws of the United States. The pertinent federal statute provides: "In all cases where [the laws of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same as not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause." 42 U.S.C. § 1988.

In *Carter* this Court, when confronted with this same issue, concluded that § 6-5-410 was not inconsistent with the Constitution and laws of the United States, citing *Robertson v. Wegmann*, 436 U.S. 584 (1978), which held that a § 1983 action would abate in accordance with Louisiana's survivorship statute. *Carter* is based in part upon *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), which held that compensatory damages are not recoverable in § 1983 actions based on Alabama's Wrongful Death Act. The *Brown* court distinguished the *Brown* case from *Robertson* by noting that the Louisiana

abatement statute “[was obviously more restrictive than the Alabama wrongful death act] and that, “like the Louisiana survival statute under consideration in *Robertson*, the Alabama death act should not be disregarded and cannot be considered ‘inconsistent’ with federal law merely because the statute provides for recovery of only punitive damages. *Brown*, 518 F. Supp. at 663-65, quoted in *Carter*, 444 So. 2d at 377. *Robertson* states simply that state law applies in § 1983 actions seeking recovery for wrongful death unless, upon application of § 1988, it is found to unduly restrict the federal claim, *Carter*, 444 So. 2d at 377, and it states that “[a] state statute cannot be considered ‘inconsistent’ [or unduly restrictive] with federal law merely because the statute causes the plaintiff to lose the litigation.” 436 U.S. at 593.

Furthermore, as noted earlier, the United States Supreme Court has held that a plaintiff cannot recover punitive damages against a municipality under § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Therefore, as *Carter* states: “[S]tate law affords a remedy beyond that now permitted under federal law—punitive damages. Thus, the application of state law . . . does not, in substance, abrogate plaintiff’s remedy against the city for violations of § 1983, but rather expands the recovery.” *Carter*, 444 So. 2d at 379 (emphasis omitted).

“The interests sought to be protected by the Alabama wrongful death statute closely parallel the interests to be protected where death results from violations [that give rise to liability under] § 1983. Thus, the purpose of § 1983 is not defeated, nor are cities insulated from liability under § 1983, because the law of Alabama does recognize an analogous cause of action [§ 6-5-410, Ala. Code 1975], affording an appropriate remedy in death cases.”

444 So. 2d at 380 (emphasis omitted).

This Court held in *Carter* that § 6-5-410, Ala. Code 1975, is not inconsistent with the Constitution and laws of the United States. We reaffirmed that holding in *Blair v. City of Rainbow City*, 542 So. 2d at 275 (Ala. 1989). We have re-examined the principles of law stated in *Carter* and *Blair*, and we conclude that the holding in those cases is still sound. The order of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hooper, C.J., and Shores, and Kennedy, JJ., concur.
Butts, J., concurs in the result.
Houston and Cook, JJ., dissent.

City of Tarrant, Alabama v. Melvin Jefferson, et al.

HOUSTON, JUSTICE (dissenting).

I am faced with a dilemma. Should I adhere to the doctrine of state *decisis*, knowing that the precedent upon which I rely (*Tatum v. Schering Corp.*, 523 So.2d 1042, 1049-63 (Ala. 1988)) was wrongly decided? To follow it would be to deny the plaintiff Melvin Jefferson a remedy. Or should I follow the law as I believe it to be, although what I believe the law to be is contrary to the opinion of the majority? To follow what I believe the law to be would afford Melvin Jefferson, as personal representative of the estate of Alberta K. Jefferson, deceased, a remedy through his action under 42 U.S.C. § 1983. If a constitutional doctrine was involved, I would follow Justice Scalia's dissent in *BMW of North America, Inc. v. Gore*, [Ms. 94-896, May 20, 1996] , ___ U.S. ___, ___ S.Ct. ___ (1996), as I did in *Ex parte Knotts*, [Ms. 1950239, July 12, 1996], ___ So.2d ___ (Ala. 1996) (Houston, J., concurring in the result). In this case, no constitutional issue is involved; however, I am convinced that this Court has erroneously interpreted Ala. Code 1975, § 6-5-410 (to hold that only punitive damages can be recovered in wrongful death cases), and I cannot expand this erroneous interpretation of § 6-5-410 to § 1983 actions and deprive Melvin Jefferson (or other plaintiffs similarly situated) of a right to a remedy, which after much research and analysis, I wholeheartedly believe that he and those similarly situated have. *Tatum v. Schering Corp.*, *supra* (Houston J., dissenting). Therefore, I respectfully dissent.

City of Tarrant, Ala. v. Melvin Jefferson, et al.

COOK, JUSTICE (dissenting).

I respectfully dissent. This Court should affirm the trial court's holding that application of the state's wrongful death statute in this fact situation would be inconsistent with the policy underlying the 42 U.S.C. § 1983 cause of action.

The majority's holding that Alabama's wrongful death statute determines whether Alberta Jefferson's § 1983 federal cause of action survives is based on this Court's opinion in *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), and *Blair v. City of Rainbow City*, 542 So. 2d 275 (Ala. 1989). I agree with the reasoning of Justice Jones and Justice Adams, who wrote specially in *Carter* and *Blair*, respectively, and who disagreed with the idea that Alabama municipalities are exempt from a wrongful death action under § 1983 because the state recognizes an analogous cause of action.

This Court in *Carter*, based on an analysis of *Robertson v. Wegmann*, 436 U.S. 584 (1978) (holding that a § 1983 action would abate in accordance with Louisiana's survivorship statute), and *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), determined that a close parallel exists between the interests being protected in actions brought under the Alabama Wrongful Death Statute and interests involved in cases where death results from violations that would give rise to liability under § 1983. Therefore, *Carter* reasoned, the purpose of § 1983 was not defeated, because under the Alabama Wrongful Death Act an appropriate remedy is provided in death cases.

The view more in accord with the policy of § 1983 is expressed in the more recent opinion of *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). In *Weeks*, the administratrix of a deceased county jail inmate sued Baldwin

County commissioners and others under § 1983, alleging violations of the inmate's rights. Judge Hand recognized in *Weeks* that (1) the *Robertson* holding was a narrow one, limited to situations in which the application of the state survivorship law does not adversely affect the § 1983 policies of compensation and deterrence, and (2) that the *Robertson* analysis could not defend the strict application of the state's wrongful death statute in cases where alleged wrongful acts of a municipality or county resulted in the decedent's death. Such an application would allow those entities to operate with immunity from § 1983 actions based on deprivations of constitutional rights, so long as the victims of those deprivations die. *Weeks*, 649 F. Supp. at 1305-06. Providing what is in essence partial immunity to municipalities in death, cases is inconsistent with the § 1983 policy of deterrence. Addressing this issue, Judge Hand wrote:

"A strict application of the Alabama wrongful death statute in cases involving municipal or county liability cannot be justified under the *Robertson* court's analysis. The Alabama statute provides for the recovery only of punitive damages, but municipalities and counties are immune from these damages in actions under § 1983. Thus, the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages, at least in cases where the decedent's death resulted from their wrongful acts. Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under § 1983 for acts that cause deprivations of constitutional rights as long as the victims die. The policy of deterrence of official misconduct that [underlies] § 1983 would obviously be severely undermined if the Alabama wrongful death statute is applied in a way that

eliminates municipal and county liability in such cases. Moreover, § 1983's policy of compensating the victims of official misconduct would also be undermined. The *Robertson* Court specifically noted that its decision was not intended to 'preclude recovery by survivors who are suing under § 1983 for injury to their own interests.'

649 F. Supp at 1305-06.

In *Robertson*, the decedent had no immediate survivors, so the executor was suing only on the estate's behalf. Alberta Jefferson has several survivors including the plaintiff Melvin Jefferson.

I agree with Justices Jones and Adams that "[w]e should either fashion a remedy allowing recovery of compensatory damages, or we should resort to the federal common law of survival, which allows compensatory damages as the appropriate relief." *Carter*, 444 So. 2d at 380 (Jones, J., concurring in part and dissenting in part); *Blair*, 542 So. 2d at 278 (Adams, J., concurring specially and quoting Justice Jones's statement). Moreover, because I also agree with the analysis in *Weeks*, that Alabama's wrongful death statute should not be held to foreclose the recovery of compensatory damages under § 1983, I respectfully dissent.

APPENDIX A-II

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction

of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title,¹ the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

¹So in original.

ARTICLE 23.

DEATH.

§ 6-5-410. Wrongful act, omission or negligence causing death.

(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the state of Alabama, and not elsewhere, for the wrongful act, omission or negligence of any person, persons or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death.

(b) Such action shall not abate by the death of the defendant, but may be revived against his personal representative and may be maintained though there has not been prosecution, conviction or acquittal of the defendant for the wrongful act, omission or negligence.

(c) The damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions.

(d) Such action must be commenced within two years from and after the death of the testator or intestate.

In The

JAN 9 1997

Supreme Court of the United States

October Term, 1996

MELVIN JEFFERSON, individually and as the Administrator of the Estate of Alberta K. Jefferson; LEON JEFFERSON; and BENJAMIN JEFFERSON,

Petitioners,

vs.

CITY OF TARRANT, ALABAMA,

Respondent.

*On Petition for a Writ of Certiorari to the
Alabama Supreme Court*

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction of Petitioner's Petition for Writ of Certiorari asserting federal issues and constitutional grounds raised for the first time in the Petition which the Alabama Supreme Court had no opportunity to consider?
2. When a decedent dies as the result of an alleged deprivation of federal rights occurring in Alabama, is the survivability of that decedent's cause of action brought under 42 U.S.C. § 1983 governed by federal common law or by reference to the Alabama Wrongful Death Act?

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OPINION BELOW

The opinion of the Alabama Supreme Court is reported at *City of Tarrant v. Jefferson*, 682 So. 2d 29 (Ala. 1996).

OBJECTION TO JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The Petition presents for the first time constitutional arguments that were never presented to the Alabama Supreme Court.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The United States constitutional provisions involved are the Supremacy Clause, U.S. CONST. art. VI, and both the equal protection and due process clauses of the Fourteenth Amendment. U.S. CONST. amend. XIV § 1.

The Alabama constitutional provision involved is the Judicial Article. ALA. CONST., art. VI, amend. 328, § 6.02(1901).

The statutory provisions involved are 42 U.S.C. §§ 1983 and 1988, ALA. CODE § 6-5-410 (1975), and ALA. CODE § 6-6-227 (1975).

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, the City of Tarrant makes the following Statement of the Case, in part, to correct perceived misstatements contained in the Petition for Writ of Certiorari.

The Petitioners seek a review of the judgment of the

Alabama Supreme Court reversing a trial court's denial of the City of Tarrant's motion for judgment on the pleadings. Importantly, the holdings of the state trial and appellate courts were made strictly as a matter of law.

In their complaint, the Petitioners sought damages in four separate counts: Count One alleges a cause of action under the Alabama Wrongful Death Act premised on intentional, negligent, wanton, careless or unskilled actions or inactions; Count Two sought damages under the Alabama common-law tort of outrage; Count Three sought damages under § 1983 for the deprivation of life pursuant to the Fourteenth Amendment to the Constitution; Count Four sought damages under § 1983 for denial of equal protection and discrimination.

The City of Tarrant moved the trial court for a judgment on the pleadings, pursuant to Rule 12(c) ALA. R. Civ. P., as to Counts Three and Four, which sought relief under § 1983. This motion was denied. Even though the trial court made its ruling as a matter of law, in their Petition, the Petitioners have attempted to provoke this Court with emotional entreaties, suggesting, for example, that the trial court had evidence before it that the City of Tarrant Fire Department did not treat black and white sections of town equally. In fact, no *admissible* evidence was presented to the trial court in support of this allegation. In any event, the evidence presumably did not color the trial court's judgment favoring the Petitioners as its decision, as well as the subsequent reversal by the Alabama Supreme Court, were made strictly as a matter of law. *See City of Tarrant v. Jefferson, supra.*

Pursuant to Rule 5, ALA. R. APP. P., the Alabama Supreme Court allowed the City of Tarrant to appeal by permission from an interlocutory order denying the City of Tarrant's motion for judgment on the pleadings. *Jefferson*, 682 So. 2d at 29. The Alabama Supreme Court reversed the trial court and remanded

the case. *Jefferson*, 682 So. 2d at 31. On August 30, 1996, the Alabama Supreme Court denied the Petitioners' application for rehearing. *Jefferson*, 682 So. 2d at 31. Subsequently, the trial court granted partial summary judgment in favor of the City of Tarrant as to Count Two. Only Count One remains; it seeks damages under state law for the death of Petitioner Melvin Jefferson's decedent.

REASONS FOR DENYING THE WRIT

I.

THE SUPREME COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE PETITIONERS' CONSTITUTIONAL ARGUMENTS ASSERTED FOR THE FIRST TIME IN THE PETITION AND NOT RAISED BEFORE THE ALABAMA COURTS.

The Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. They have failed to comply with the requirements of the "properly-raised-federal-question" doctrine. *See Webb v. Webb*, 451 U.S. 493, 500 (1981). "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb*, 451 U.S. at 496-97.

Like the Petitioner in *Webb*, the Petitioners in the instant case failed to assert any violations of the United States Constitution when this action was briefed in the Alabama Supreme Court. None of Petitioners' arguments in the proceedings below addresses constitutional issues. Previously, the Petitioners made only unspecific arguments concerning the Alabama Supreme Court's interpretation of 42 U.S.C. §§ 1983

and 1988 "in a manner that is inconsistent with the Constitution and laws of the United States." In their Petition for Writ of Certiorari, the Petitioners for the first time cited a specific constitutional provision, the Supremacy Clause of the United States Constitution.

Alabama law is consistent with federal law: arguments not presented in the trial court cannot be presented to an appellate court. *Ex parte St. Vincent's Hosp.*, 652 So. 2d 225, 228 (Ala. 1994). At no point in the proceedings in the Alabama courts did the Petitioners provide the Alabama Attorney General with notice that the constitutionality of the Alabama Wrongful Death Act was being challenged. Such notice is required under Alabama law. ALA. CODE § 6-6-227 (1975); ALA. R. APP. P. 44(c); *Wallace v. State*, 570 So. 2d 466, 468 (Ala. 1987). In Alabama, the failure to serve the Attorney General with court documents in which the constitutionality of a state statute is being challenged leaves the reviewing court without jurisdiction to hear the case. *Wallace*, 570 So. 2d at 468.

"At the minimum, . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by law." *Webb*, 451 U.S. at 501. When a Petition fails to do so, this Court has determined that it is without jurisdiction. *Webb*, 451 U.S. at 501-02. The Petitioners asserted claims pursuant to §§ 1983 and 1988 in the court below, but failed to address the Supremacy Clause. Further, the Petition does not state that the Petition was served on the Alabama Attorney General and that 28 U.S.C. § 2403(b) may apply as required by Supreme Court Rule 29.4(c). Accordingly, the Petitioners' constitutional claims should not be considered, and this Petition should be denied for lack of jurisdiction.

II.

APPLICATION OF THE ALABAMA WRONGFUL DEATH ACT IN § 1983 LITIGATION IS CONSISTENT WITH THE CONSTITUTION AND FEDERAL LAW.

The Petition for Writ of Certiorari misstates the law by urging that an application of the Alabama Wrongful Death Act in the context of § 1983 litigation is inconsistent with the Constitution and federal law.

A. When a decedent dies as the result of an alleged deprivation of federal rights occurring in Alabama, the survivability of that decedent's cause of action brought under 42 U.S.C. § 1983 is governed by reference to the Alabama Wrongful Death Act.

Section 1983 contains no survivorship provision. See 42 U.S.C. § 1983. However, when federal law is "deficient," 42 U.S.C. § 1988 refers courts and litigants to the law of the state in which the action is brought "so far as the [state law] is not inconsistent with the Constitution and laws of the United States . . ." The Alabama Wrongful Death Act, ALA. CODE § 6-5-410 (1975), is the state statute governing the survival of § 1983 claims arising in Alabama. See *Carter v. City of Birmingham*, 444 So. 2d 373, 374 (Ala. 1983), cert. denied, 467 U.S. 1211 (1984) (holding that the survivability of § 1983 claims for compensatory damages is determined by reference to the Alabama Wrongful Death Act).

Federal courts and the Alabama Supreme Court have construed 42 U.S.C. §§ 1983 and 1988 together with the Alabama Wrongful Death Act. With one exception, the courts that have examined the interaction of these statutes have determined that the Alabama Wrongful Death Act governs the

survivability of an action for a decedent's injuries under § 1983. *Compare Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981); *James v. Murphy*, 392 F. Supp. 641, 645 (M.D. Ala. 1975); *Pollard v. United States*, 384 F. Supp. 304, 306 (M.D. Ala. 1974); *Carter*, 444 So. 2d at 373 with *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986).¹ Indeed, the fact that the court in *Weeks* is the *only* federal court to reach the conclusion urged by the Petitioners belies their statement that “[i]t is clear that the federal courts passing on the issue have seen the inconsistency in the application of the Alabama Wrongful Death Act to § 1983 actions” (Petition at 12).

The plain wording of 42 U.S.C. §§ 1983 and 1988 compels the conclusion reached by the Alabama Supreme Court in this case: the survivability of § 1983 claims is determined by reference to the Alabama Wrongful Death Act. *Jefferson*, 682 So. 2d at 30.

As the Petitioners' lawsuit purports to seek recovery for death, it is, even quite apart from the § 1983 claims, purely a creature of statute. Alabama citizens have been able to bring wrongful death actions since 1852. *See ALA. CODE § 1938* (1852). The right to bring such actions is statutorily conferred. *See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 127, at 945 (5th ed. 1984) (observing that at common law, the dependents and heirs of a tort victim who had been killed were denied recovery). Alabama is a common-law jurisdiction. *See ALA. CODE § 1-3-1* (1975).

1. Suggestions by the Petitioners that the Eleventh Circuit has delivered “binding federal court precedent” holding that the application of the Alabama Wrongful Death Act in § 1983 litigation are disingenuous. (*See* Petition at 12 n.1). *Gilmere v. City of Atlanta, Georgia*, 864 F.2d 734 (11th Cir. 1989), which is cited for this very proposition in the Petition, addressed Georgia statutes. The statements contained in that opinion concerning Alabama law are mere dicta.

The result in *Carter* presents the only construction that the applicable statutory authority will permit. “ ‘Since there is no express federal remedy for wrongful death under the civil rights statutes . . . the common and statutory law of the State of Alabama must be looked to for a suitable remedy not inconsistent with the Constitution and the laws of the United States. 42 U.S.C. § 1988.’ ” *Carter*, 444 So. 2d at 375 (quoting *Pollard*, 384 F. Supp. at 306). The survivability of § 1983 claims for compensatory damages is determined by reference to the Alabama Wrongful Death Act. *Carter*, 444 So. 2d at 374.

Despite the clear statutory directive of 42 U.S.C. § 1988 that state law is referenced when, as here, § 1983 is deficient, the Petitioners suggest that Alabama statutory and common law be abandoned. Apparently, the Petitioners would have this Court fashion a remedy for a federal right of wrongful death recovery based on a federal statute that itself has no provisions concerning the survival of actions, the class of beneficiaries, the proper parties to bring suit, and the damages recoverable. The absence of all of these provisions is the very reason § 1988 references state law in the first place. *See Brown*, 518 F. Supp. at 665 (“In death cases, . . . federal law is deficient. Reference must be made to state law.”).

B. Application of the Alabama Wrongful Death Act in the context of § 1983 litigation does not create an inconsistency with the Constitution or with federal law.

Alabama's Wrongful Death Act permits the recovery of punitive damages only. *See Bell v. Riley Bus Lines*, 57 So. 2d 612 (Ala. 1952) (“It has long been settled in Alabama that damages recoverable in [wrongful death] actions are punitive of the person who wrongfully causes the death.”). Punitive damages, however, are not recoverable against municipalities in actions brought pursuant to 42 U.S.C. § 1983, although such

damages are recoverable against individual defendants. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981).

The mere fact that the Petitioners cannot recover *under § 1983* against the City of Tarrant affords no legal argument that a special exception to Alabama's Wrongful Death Act should be carved out for the Petitioners. As this Court has carefully explained,

That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. *A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation.* If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes: it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.

Robertson v. Wegmann, 436 U.S. 584, 593 (1978) (emphasis supplied).

In *Carter v. City of Birmingham, supra*, the Alabama Supreme Court held that because the Alabama Wrongful Death Act provides only for the recovery of punitive damages and, because in light of *City of Newport, supra*, no punitive damages

may be awarded against municipalities in § 1983 actions, a plaintiff may not recover damages from a municipality under § 1983 when death results. *Carter*, 444 So. 2d at 379. However, the court in *Carter* observed that "the state law action against the city for wrongful death is still available to the plaintiff." *Carter*, 444 So. 2d at 379.

In *Carter*, the Alabama Supreme Court directly addressed the issue of whether application of the Alabama Wrongful Death Act to § 1983 actions "creates an inconsistency with the Constitution and the laws of the United States...." *Carter*, 444 So. 2d at 379. It concluded that no "inconsistency" was created because plaintiffs still have available "the state action against the city for wrongful death...." *Carter*, 444 So. 2d at 379. Writing for the Alabama Supreme Court in *Carter*, Justice Beatty noted,

The interests sought to be protected by the Alabama wrongful death statute closely parallel the interests to be protected where death results from the violations of § 1983. Thus, the purpose of § 1983 is not defeated, nor are cities insulated from liability under § 1983, because the law of Alabama *does* recognize an analogous cause of action, affording an appropriate remedy in death cases.

Carter, 444 So. 2d at 380 (citing *Brown*, 518 F. Supp. at 661).

Although punitive damages may not be recovered against a municipality in a § 1983 action, "[Alabama] state law affords a remedy beyond that now permitted under federal law — punitive damages." *Carter*, 444 So. 2d at 379. Although punitive damages are not recoverable against municipalities "under 42 U.S.C.

§ 1983,” *City of Newport*, 453 U.S. at 271 (emphasis supplied), in Alabama, punitive damages are recoverable against municipalities in wrongful death claims. *See ALA. CODE § 6-11-29* (1975) (governmental exemption from punitive damages does not apply to wrongful death claims). A state law wrongful death action is distinct from a § 1983 claim, and the two causes of action provide for different types of damages.

Thus, the deterrent objectives of § 1983 are not impeded by referencing the Alabama Wrongful Death Act in cases in which death results from a constitutional deprivation. The Petitioners urge that application of Alabama’s Wrongful Death Act provides “[no] deterrence to those who would commit [constitutional wrongs].” (Petition at 9). This argument is flawed for several reasons. First, as this Court noted in *Robertson v. Wegmann*, *supra*, and as the Alabama Supreme Court observed in *Carter*, “[A] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him.” *Carter*, 444 So. 2d at 380 (quoting *Robertson*, 436 U.S. at 592). Second, the municipality faces liability under state law for wrongful death. *Carter*, 444 So. 2d at 379. Third, the official himself faces liability under state law for wrongful death. Fourth, the official himself faces potential criminal liability. Fifth, the Petitioners assume that public officials will turn a blind eye to misconduct, but “[t]he more reasonable assumption is that responsible superiors are motivated . . . by concern for the Government’s integrity.” *City of Newport*, 453 U.S. at 268 (quoting *Carlson v. Green*, 446 U.S. 14, 21 (1980)). Finally, the Petitioners’ argument assumes that municipal officials in Alabama will have a grasp of the nuances of § 1983 jurisprudence and will reach the incredible conclusion that, despite the civil and criminal liability they would face as individuals, and despite the liability that their employer would face under the Alabama Wrongful Death Act, it would make sense to kill someone, as opposed to inflicting a lesser

injury, because their employer would not have to pay damages on a § 1983 claim.

The deterrent objective of § 1983 is effective to the extent it impresses individual government actors. “[A] damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer.” *City of Newport*, 453 U.S. at 270. Individual actors in Alabama still face liability under § 1983 when death results. *Carter*, 444 So. 2d at 380. Application of the Alabama Wrongful Death Act to § 1983 cases does not vitiate the objective of deterrence implicit in § 1983.

Likewise, the compensatory objectives of § 1983 are not impeded by referencing the Alabama Wrongful Death Act. The Petitioners urge that application of the Alabama Wrongful Death Act offers no “Adequate Remedy for the Victims of Official Misconduct.” (Petition at 14). This contention is based on an Alabama statute limiting recovery on claims against municipalities to \$100,000. (Petition at 14); *see ALA. CODE § 11-93-2* (1975). This argument ignores the remedies other than a wrongful death action against the municipality available to the personal representatives of persons killed as a result of governmental misconduct in Alabama. *See supra*. Furthermore, this Court has observed: “The goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation for one who is merely suing as the executor of the deceased’s estate.” *Robertson*, 436 U.S. at 592. Similarly, the goal of compensation provides no basis for requiring compensatory damages to the statutory distributees to an Alabama wrongful death suit.²

2. The deceased’s estate is not benefitted from a wrongful death action in Alabama; instead, any recovery is distributed according to the statute of distributions. *ALA. CODE § 6-5-410(c)* (1975).

C. The Petitioners mistakenly suggest that § 1983 actions have been eliminated in wrongful death cases in Alabama.

The Petitioners suggest more than once that the Alabama Supreme Court has “totally eliminate[d] § 1983 actions in death cases. . . .” (Petition at 15; *see also* Petition at 8, 13). This is a misstatement of law. Instead, the Alabama Supreme Court has held that reference must be made to the Alabama Wrongful Death Act in determining the survivability of an action for a decedent’s injuries under § 1983. This holding does not eliminate § 1983 actions in cases involving death, and arguments to the contrary are both mistaken and misleading.

Additionally, the Petitioners misstate the law when they urge that the Alabama Supreme Court departed from its own precedent by refusing to be bound by the decisions of federal courts construing federal law. (Petition at 12 n. 1). As the state’s highest court, the Alabama Supreme Court is bound only by United States Supreme Court decisions. U.S. CONST. art. VI, cl. 2; ALA. CONST., art. VI, amend. 328, § 6.02 (1901); *Weems v. Jefferson-Pilot Life Ins. Co.*, 663 So. 2d 905, 913 (Ala. 1995) (“[T]he correct rule, briefly stated, is that ‘[t]his Court may rely on a decision of any federal court, but it is bound by the decisions of the United States Supreme Court.’”) (quoting *Ex parte Gurganus*, 603 So. 2d 903, 908 (Ala. 1992) (Shores, J., concurring specially)). The Alabama Supreme Court has unequivocally followed this principle of law for many years. *See, e.g., Seibold v. State*, 253 So. 2d 302 (Ala. 1970) (“It is well settled that decisions of federal courts other than the Supreme Court are not binding on a state court of last resort.”).

D. The decision reached by the Alabama Supreme Court in this case does not implicate this Court’s holding in *Felder v. Casey*.

The Petitioners suggest that the Alabama Supreme Court has exhibited “dissain” for this Court’s holding in *Felder v. Casey*, 487 U.S. 131 (1988). (Petition at 13-14). This contention is without merit. The Petitioners rely heavily on *Felder* by selectively quoting from that opinion. A careful reading of *Felder* reveals that it is inapposite.

Felder concerned a question of preemption. *Felder*, 487 U.S. at 138. Specifically, the Court in *Felder* addressed whether application of the State of Wisconsin’s notice-of-claim provision to § 1983 actions brought in state courts created an obstacle to the objectives of Congress. *Felder*, 487 U.S. at 138. The instant case does not involve preemption of state law by superseding federal law. Quite the opposite: this case involves the *adoption* of state law pursuant to the directives of 42 U.S.C. § 1988. Indeed, this Court in *Felder* agreed with the observations of lower federal courts that, “[T]he absence of any notice-of-claim provision is not a deficiency requiring the importation of such statutes into the federal civil rights scheme.” *Felder*, 487 U.S. at 140. The absence of a survivorship provision, on the other hand, does involve just such a deficiency. *See Robertson*, 436 U.S. at 589-90; *Brown*, 518 F. Supp. at 665.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

Supreme Court, U.S.

FILED

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Case No. 96-957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

vs.

CITY OF TARRANT, ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a claim for money damages against a municipality in the State of Alabama, brought pursuant to 42 U.S.C. §1983, will lie where death has resulted from the constitutional deprivation complained of. The issue presents itself because 42 U.S.C. §1983 does not contain a survivorship provision. This "gap" is closed by 42 U.S.C. §1988 which states that where the civil rights statutes are deficient in providing a remedy, "The common law, as modified and changed by the Constitution and statutes of the state wherein the Court having jurisdiction of such civil or criminal case is held, *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall extend to and govern . . ." 42 U.S.C. §1988.

In a case brought in Alabama, the survivorship provision that becomes operative pursuant to §1988 is the Alabama Wrongful Death Act. Ala. Code §6-5-410 (1975). The Alabama Wrongful Death Act has been held to provide for the recovery of punitive damages only. *See e.g.*, *King v. National Spa and Pool*, 607 So. 2d 1241, 1246 (Ala. 1992). This Court, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), has held that municipalities are immune from punitive damages. When presented with these precedents, the Alabama Supreme Court, following *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), held that no §1983 claim survives, and plaintiffs proceeding in a death case against a municipality are left with a state law cause of action that limits damages to \$100,000.00 by Ala. Code §11-93-2 (1975), and that does not provide for the fees and expenses available to a prevailing §1983 litigant. The Alabama Supreme Court's decision presents the following issue: Is the application of the Alabama Wrongful Death Statute in such a way that it would bar §1983 actions against a municipality in any case where death is the result of the constitutional depriva-

vation, leaving litigants with only a severely limited state law claim inconsistent with the Constitution and laws of the United States?

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I. *The Federal Question Raised By This Appeal Was Properly Raised In The Alabama Supreme Court.*

Respondent first argues that this Court lacks jurisdiction because Petitioners failed to comply with the "properly raised federal question" doctrine (Reply at 3). This argument is wholly without merit. The standard for determining whether an issue has been properly presented in the State Court is, "If the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). This has certainly been done in this case. There is no question that the federal issue of whether the Alabama Supreme Court's application of the Alabama Wrongful Death Act to death cases brought under 42 U.S.C. §1983 against municipalities is inconsistent with the Constitution and laws of the United States was properly raised in the Alabama Supreme Court.

The opinion below (Petition, App. A-1 to Petition for Writ of Certiorari) clearly states that the federal issue of whether the Alabama Wrongful Death Act has been applied in an unconstitutional manner regarding §1983 death claims against municipalities was the issue before it. In an attempt to avoid jurisdiction, Respondent argues that it was made aware that Petitioners relied upon the supremacy clause of the United States Constitution for the first time in the Petition for Certiorari. This is not true. Petitioner argued to the Alabama Supreme Court in support of the contention that the Alabama Wrongful Death Act has been applied unconstitutionally in this case that "the supremacy clause imposes on state courts a constitutional duty 'to proceed in such a manner that all the substantial rights under controlling federal law are protected'" (Brief to Alabama Supreme Ct., portions specifically arguing the supremacy clause attached as Appen-

dix A-I), citing *Felder v. Casey*, 108 S.Ct. 2302, 2313-14 (1988).

Petitioner went on to argue before the Alabama Supreme Court, citing *Howlett v. Rose*, 110 S.Ct. 2430, 2440 (1990) that "the supremacy clause forbids state courts to dissociate themselves from federal law because of disagreement with its content, or a refusal to recognize the superior authority of its source" (App. A-I). For Respondent to now argue that the supremacy clause was raised for the first time in the Petition for Writ of Certiorari is simply not the case.

Even if Petitioners did not specifically cite the supremacy clause below, this Court has jurisdiction because the issue was clearly argued below, and the Alabama Supreme Court based its decision on a federal issue. The jurisdiction of this Court "does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982). Even *Webb v. Webb*, 101 S.Ct. 1889 (1981), cited by Respondent, recognizes that there is no exact formula for raising an issue below. The requirement is that litigants have a reasonable opportunity to have the federal issue heard and determined. *See, Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190-94 (1925). The *Webb* Court stated:

Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute they rely, we have not insisted on such inflexible specificity.

Webb, 101 S.Ct. at 1894. Respondent's argument is deficient for two reasons: (1) The supremacy clause *was* cited and relied upon by petitioner at the Alabama Supreme Court; and (2) even if it were not so specifically raised, there is no question that both parties had the opportunity to litigate the federal issue of whether the Alabama

Wrongful Death Act has been applied to 42 U.S.C. §1983 death actions in an unconstitutional manner.

Respondent's argument that Petitioner has failed to provide the Alabama Attorney General with notice that the constitutionality of Ala. Code §6-5-410 was being challenged is a similar red herring. First, Ala. Code §6-6-227 (1975) (App. A-II), which Respondent states placed a duty on Petitioners to notify the Alabama Attorney General of these proceedings, states that the Attorney General must be served "In any proceeding which involves the validity of a municipal ordinance, or franchise . . ." There is no municipal ordinance involved in this case. Similarly, the statute concerns only declaratory judgment actions, this is not such an action. As such, Ala. Code §6-6-227 did not place a duty on Petitioners to notify the Alabama Attorney General of the pendency of this action.

Similarly, Ala. R. App. P. 44(c) cited by Respondent does not apply to this case. The Rule states that if the validity of a "statute, executive or administrative order, municipal ordinance . . ." is raised, that service must be made (in the case of a state statute, upon the attorney general). This is not a case where the *validity* of Ala. Code §6-5-410 has been called into question. The Alabama Supreme Court's opinion clearly shows that the constitutionality of the Alabama Wrongful Death Act has never been questioned, only its application to a federally created right under 42 U.S.C. §1983.¹ As such, the duty

¹Even if the constitutionality of Ala. Code §6-5-410 were called into question here, the failure of the Alabama Attorney General's office to participate in the proceedings provides no defect. The comments to Rule 44 state that the failure to give notice is not fatal, but is an omission which will be supplied in accordance with subdivision (d) of the rule. Committee Comment, Ala. R. App. P. 44. Subdivision (d) of Ala. R. App. P. states that the appellate court will not rule until

of notification under Ala. R. App. P. 44(c) was not triggered in this case.

II. The Decisions By The Alabama Supreme Court In *Carter v. City of Birmingham*, And This Case Are Inconsistent With The Laws And Constitution Of The United States.

The Petition for Certiorari set forth the reasons that the Court's decision in this case, relying upon *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), is inconsistent with the Constitution and Federal law. Respondent attempts to argue that the cases of *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), *James v. Murphy*, 392 F. Supp. 641 (M.D. Ala. 1975), and *Pollard v. United States*, 384 F. Supp. 304 (M.D. Ala. 1974), somehow support its position. That is simply not the case. In *James*, the Court did not pass on the question. The *James* Court held only that when a claim is made on a death in Alabama under §1983, punitive damages must be pled. *James*, 392 F. Supp. at 646. Similarly, *Pollard*, is not on point. The holding in that case was that the state statute of limitations could act as a bar in a §1983 ruling. *Pollard*, 384 F. Supp. at 307. Obviously, there is no statute of limitations issue in the case at bar.

Contrary to Defendant's argument that "the federal district court in *Brown* has determined that the Court in *Brown* specifically abstained from offering an opinion on the issue *sub judice*, stating:

the notice contemplated by this rule has been given to the appropriate governmental body and the said governmental body or chief legal officer has been given such opportunity to respond as shall be set by the court." The Alabama Supreme Court did rule. Obviously, it too was aware that this case does not call into question the validity or constitutionality of the Alabama Wrongful Death Act, only its application to 42 U.S.C. §1983 actions.

The court notes that, in instances where a wrongful death action is brought against a municipality under 1983 in Alabama, the result reached in this case, coupled with the recent Supreme Court opinion in *City of Newport v. Fact Concerts, Inc.*, U.S. , 101 S.Ct. 2748, 69 L.Ed.2d 619 (1981), which held that municipalities for wrongful deaths caused by them in Alabama . . . Absent amendment, the court expresses no opinion on how the inconsistency would be remedied in Alabama death cases under 1983.

Brown, 518 F. Supp. at 664, n. 3. Moreover, both *James* and *Pollard* were decided before the decision in *Newport v. Fact Concerts, Inc.* As such, there was no decision on whether the complete elimination of a 42 U.S.C. §1983 claim against a municipality would be inconsistent with the Constitution and laws of the United States.

The only court to decide the issue in the case at bar, whether the Alabama Wrongful Death Act will be applied when its effect would be to totally eliminate §1983 claims against municipalities, is *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). The *Weeks* Court, as stated in the Petition for Certiorari, clearly held that "the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages . . . [and] such a result would be inconsistent with the policies underlying §1983. *Weeks*, 649 F. Supp. at 1305.

Respondent next argues that the U. S. Supreme Court's decision in *Robertson v. Wegman*, 436 U.S. 584 (1978), stands for the proposition that a state statute which eliminates a cause of action based upon a state survivorship provision will not be inconsistent merely because it causes a plaintiff to lose litigation. In *Robertson*, the plaintiff died *after* the institution of the §1983 action, and its claim abated because there was no surviving rela-

tive who could maintain the action under the Louisiana survivorship statute. This was not considered inconsistent only because the deprivation of civil rights had no bearing on the death and subsequent abatement. The Court stated:

A different situation might well be presented, as the District Court noted, if state law "did not provide for the survival of any tort actions" [citation omitted] or if it significantly restricted the types of actions that survive . . . we animate no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death.

Robertson, 98 S.Ct. at 1997. Contrary to defendant's contention, *Robertson* in no way holds that state law depriving a §1983 litigant of a cause of action arising out of said deprivation is not inconsistent with federal law and the principles of an underlying §1983. To the contrary, *Robertson* did stand for the proposition that where a state provision is inconsistent with the Constitution and laws of the United States, "state law may not be applied . . ." *Robertson v. Wegman*, 98 S.Ct. at 1995.

While Respondent argues that no inconsistency is created because a state cause of action remains, it cannot escape the fact that the remaining state law action is woefully inadequate. Recovery under the state law cause of action in this matter is capped at \$100,000.00 by Ala. Code §11-93-2 (1975). In 1997, such an award for a wrongful death is less than significant. Where the goals of §1983 are deterrence and compensation, *See, Weeks, supra*, a capped state law claim offers no adequate substitution for a §1983 claim.

This argument further ignores that the remedies provided for by §1983 are not substitutes for, but in addition to, state law remedies. "It is no answer that the state

has a law which if in force would give relief. The federal remedy is supplementary to the state remedy . . ." *Monroe v. Hape*, 81 S.Ct. 473, 482 (1961). The federal cause of action provides a uniquely federal remedy in *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d Cir. 1983), the Court held that, "To whatever extent §1988 makes state law applicable to §1983 actions, it does *not* require deference to a survival statute that would bar or limit the remedies available under §1983 for unconstitutional conduct that causes death." As such, Respondent's argument that §1983 death actions against municipalities in Alabama ought to be eliminated because of an "adequate" state law remedy is not well taken.

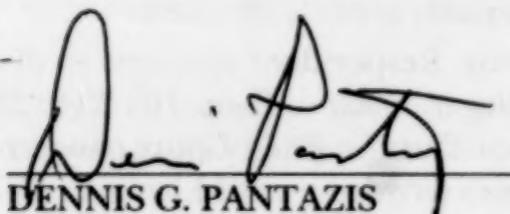
Lastly, Respondent attempts to distinguish this Court's holding in *Felder v. Casey*, 108 S.Ct. 2302 (1988), by pointing out that the *Felder* Court concerned whether a notice of claim provision could provide a limitation to a §1983 action, and this case involves the "adoption" of state law pursuant to the directions of 42 U.S.C. §1988 (Respondent's Opposition, p. 13). This is a difference without a distinction. Respondent cannot hide from the fact that the *Felder* Court refused to allow a state procedural statute to eliminate a claim under 42 U.S.C. §1983. *Felder* held that "a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted, even where federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy." *Felder*, 108 S.Ct. at 2307. Similarly, an application of the Alabama Wrongful Death Act that would immunize government conduct otherwise subject to suit under §1983 is to be preempted where the effect would be to immunize Alabama municipalities from "a uniquely federal remedy against encroachments . . . upon rights secured by the Constitution and laws of the Nation . . ." *Felder*, 108 S.Ct.

at 2307, citing *Mitchum v. Foster*, 92 S.Ct. 2151, 2160 (1972).

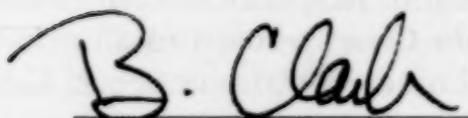
CONCLUSION

For the foregoing reasons, and for the reasons cited in the Petition for Writ of Certiorari on this case, the Petition is due to be granted.

RESPECTFULLY SUBMITTED,



DENNIS G. PANTAZIS
Counsel of Record



BRIAN M. CLARK
Counsel of Record

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APPENDIX

N THE SUPREME COURT FOR
THE STATE OF ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator)
of the Estate of Alberta K.)
Jefferson; LEON JEFFERSON;)
and BENJAMIN JEFFERSON,)
Plaintiffs/)
Appellees,)
V.) CASE NO.: 1941573
CITY OF TARRANT, ALABAMA,) CIVIL DOCKET
et al.,) NO.: CV 94-4523
Defendants/)
Appellant.)

APPEAL FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

CIVIL ACTION NO. 94-4523

REPLY BRIEF OF APPELLEES, MELVIN JEFFERSON,
INDIVIDUALLY AND AS ADMINISTRATOR OF THE
ESTATE OF ALBERTA K. JEFFERSON; LEON
JEFFERSON; AND BENJAMIN JEFFERSON

ORAL ARGUMENT REQUESTED

Dennis G. Pantazis
 Brian M. Clark
 GORDON, SILBERMAN, WIGGINS &
 CHILDS, P.C.
 Attorneys at Law
 1400 SouthTrust Tower
 Birmingham, Alabama 35203
 Telephone: (205) 328-0640

Attorneys for Plaintiffs-Appellees

Supreme Court opinion in *City of Newport v. Fact Concerts, Inc.*, ___ U.S. ___, 101 S.Ct. 2748, 69 L.Ed.2d 619 (1981), which held that municipalities for wrongful deaths caused by them in Alabama . . . Absent amendment, the court expresses no opinion on how the inconsistency would be remedied in Alabama death cases under 1983.

Brown, 518 F. Supp. at 664, n. 3. *Gilmere* and *Weeks*, as well as *McFadden*, discussed below clearly show that the application of the Alabama Wrongful Death Act under *Carter* is inconsistent with federal law.

3. *Under U. S. Supreme Court Authority The Application Of The Alabama Wrongful Death Act Urged By Defendant Is Inconsistent With The Purposes Of §1983.*

While state courts may entertain §1983 actions, §1983 affords a federal cause of action for citizens deprived of the rights, privileges and immunities guaranteed by the Fourteenth Amendment by state agencies. *Monroe v. Pape*, 31 S.Ct. 473, 480 (1961). As stated explained *supra*, however, "where state courts

entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Felder v. Casey*, 108 S.Ct. 2302 (1988). That is exactly what Defendant seeks to do in this case.

In *Felder*, a motion to dismiss was granted a municipal defendant on a §1983 claim because the plaintiff failed to comply with Wisconsin's notice-of-claim statute. The Court held that the notice-of-claim statute could not act as a bar to a federal §1983 action. In reaching its decision the *Felder* Court held that,

Just as federal courts are constitutionally obligated to apply state law to state claims, *see Erie B. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82

L.Ed. 1188 (1938), so too the supremacy clause imposes on state courts a constitutional duty "to proceed in such a manner that all the substantial rights under controlling federal law are protected."

Felder, 108 S.Ct. at 2313-14, citing *Garrett v. Moore-McCormack Co.*, 63 S.Ct. 246, 251 (1942).

If the Alabama Wrongful Death Act is applied as Defendant urges, the substantial rights of equal protection denied Mrs. Jefferson cannot be remediated. The U. S. Supreme Court has stated that state courts are without such power curb those rights, stating that "The supremacy clause forbids state courts to dissociate themselves from federal law because of disagreement with its content, or a refusal to recognize the superior authority of its source." *Howlett v. Rose*, 110 S.Ct. 2430, 2440 (1990).

Defendant agrees that the Alabama courts are bound by the U. S. Supreme Court. Because the Supreme Court has held that a state law cannot vacate a §1983 claim designed to remediate constitutional wrongs, the Alabama Supreme Court is bound to find the application of the Alabama Wrongful Death Act as applied by *Carter* to be inconsistent with federal law. See, *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876) ("The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as state laws are . . .").

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

vs.

CITY OF TARRANT, ALABAMA,
Respondent.

ON WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

JOINT APPENDIX

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Counsel for Respondent

**PETITION FOR CERTIORARI FILED
NOVEMBER 27, 1996
CERTIORARI GRANTED MARCH 31, 1997**

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CHRONOLOGICAL LISTING OF RELEVANT DATES

June 21, 1994	Civil Complaint and Demand for Jury Trial filed
August 5, 1994	Defendants' Motion to Dismiss filed
August 8, 1994	Defendants' Motion to Dismiss Overruled, 30 days to Answer
June 16, 1995	Defendants' Answer to Complaint filed
June 24, 1995	Defendants' Motion for Summary Judgment filed
June 30, 1995	Defendants' Motion to Limit Plaintiff's Demand for Judgment to Statutory Limit filed
June 30, 1995	Defendants' Motion for Judgment on the Pleadings filed
July 14, 1995	Plaintiffs' Opposition to Defendants' Motion for Judgment on the Pleadings and Motion to Limit Plaintiffs' Demand for Judgment to Statutory Limit filed
July 16, 1995	Defendants' Motion to Strike Plaintiffs' Opposition to Summary Judgment and Judgment on the Pleadings filed
July 17, 1995	Defendants' Motion for Summary Judgment Overruled by Judge Drayton James

CHRONOLOGICAL LISTING OF RELEVANT DATES

July 17, 1995	Defendants' Motion to Limit Plaintiff's Demand for Judgment to Statutory Limit Overruled by Judge Drayton James
July 17, 1995	Defendants' Motion for Judgment on the Pleadings Granted as to Punitive Damages; Overruled as to Compensatory Damages entered by Judge Drayton James
July 17, 1995	Statement of Circuit Court Judge
August 23, 1995	Supreme Court of Alabama Order granting permission to petitioner to appeal from the interlocutory order entered on July 17, 1995
July 12, 1996	Supreme Court of Alabama Opinion where trial court's order is reversed and remanded
August 30, 1996	Supreme Court of Alabama Notice that application for rehearing is overruled
March 31, 1997	Petition for Writ of Certiorari is granted by the Supreme Court of the United States.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually,)
and as the Administrator of the)
Estate of Alberta K. Jefferson; Leon)
Jefferson; Benjamin Jefferson,)

PLAINTIFFS

VS.) CIVIL ACTION
) NO.: _____

CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT; A, B, C, D, E,)
whether singular or plural, that)
person or those persons who were)
the agents and/or employees of the)
City of Tarrant, who through their)
neglect, carelessness, and)
unskillfulness refused to rescue)
and/or revive the decedent, Alberta)
K. Jefferson; F, G, H, I, J, whether)
singular or plural, that person or)
those persons who were the agents)
and/or employees of the City of)
Tarrant Fire Department, who)
through their neglect, carelessness,)
and unskillfulness refused to rescue)
and/or revive the decedent, Alberta)
K. Jefferson; K, L, M, whether)
singular or plural, that person or)
those persons who were the agents)
and/or employees of the City of)
Tarrant who were responsible for)
participating in the reporting,)

recording, or sanctioning of the)
 neglect, carelessness, and)
 unskillfulness in refusing to rescue)
 and/or revive the decedent, Alberta)
 K. Jefferson; N, O, P, whether)
 singular or plural, that person or)
 those persons who were the agents)
 and/or employees of the City of)
 Tarrant Fire Department who were)
 responsible for participating in the)
 reporting, recording, or sanctioning)
 of the neglect, carelessness, and)
 unskillfulness in refusing to rescue)
 and/or revive the decedent, Alberta)
 K. Jefferson; R, S, T, whether)
 singular or plural, that person or)
 those persons who were the agents,)
 officers, or employees of the City)
 of Tarrant, and who were responsible)
 for the implementation of policies,)
 customs, or guidelines of the City of)
 Tarrant Fire Department relating to)
 their duties for the rescue and)
 reliable of persons at fire scenes,)
 procedures for the account ability)
 of the employees and agents of the)
 City of Tarrant Fire Department, and)
 procedures to prevent the continued)
 care less, unskillful, and negligent)
 failure to rescue and/or revive)
 persons at fire scenes; U, V, W,)
 whether singular or plural, that)
 person or those persons who were)
 the agents, officers or employees of)
 the City of Tarrant Fire Department,)
 and who were responsible for the)

implementation of policies, customs,)
 or guidelines of the City of Tarrant)
 Fire Department relating to their)
 duties for the rescue and reliable)
 of persons at fire scenes, procedures)
 for the account ability of the)
 employees and agents of the City of)
 Tarrant Fire Department, and)
 procedures to prevent the continued)
 care less, unskillful, and negligent)
 failure to rescue and/or revive)
 persons at fire scenes,)

DEFENDANTS.

COMPLAINT

Come now the plaintiffs, Melvin Jefferson, individually and as Administrator of the Estate of Alberta K. Jefferson, Leon Jefferson, and Benjamin L. Jefferson, by and through their under signed counsel, and file this Complaint. As grounds for the relief requested, the plaintiffs state as follows:

PARTIES

1. Melvin Jefferson brings this action as the Administrator of the Estate of Alberta K. Jefferson, and as an individual, who was at the scene of the incident giving rise to this action.
2. Leon Jefferson is the son of the decedent, Alberta K. Jefferson, and was present at the scene of the incident giving rise to this action.
3. Benjamin Jefferson is the husband of the decedent, Alberta K. Jefferson, and was at the scene of the incident giving rise to this action.

4. The City of Tarrant, Alabama is a municipal corporation existing by virtue of the laws of the State of Alabama, and as a body corporate subject to suit in this court.

5. The City of Tarrant, Alabama Fire Department is a municipal fire department existing by virtue of the laws of the State of Alabama.

6. Fictitious parties A, B, C, D, and E are those persons who were the agents and/or employees of the City of Tarrant, Alabama who through their negligence, wantonness, carelessness and unskillfulness refused to rescue and/or revive the decedent, Alberta K. Jefferson.

7. Fictitious parties F, G, H, I, and J are those persons who were the agents and/or employees of the City of Tarrant, Alabama Fire Department who through their negligence, wantonness, carelessness and unskillfulness refused to rescue and/or revive the decedent, Alberta K. Jefferson.

8. Fictitious parties K, L, and M are those persons who were the agents and/or employees of the City of Tarrant who were responsible for participating in the reporting, recording and sanctioning of the negligence, wantonness, carelessness, and unskillfulness exhibited in refusing to rescue and/or revive the decedent, Alberta K. Jefferson.

9. Fictitious parties N, O, and P are those persons who were the agents and/or employees of the City of Tarrant Fire Department who were responsible for participating in the reporting, recording and sanctioning of the negligence, wantonness, carelessness, and unskillfulness exhibited in refusing to rescue and/or revive the decedent, Alberta K. Jefferson.

10. Fictitious parties R, S, and T are those persons who were the agents, officers, or employees of the City of Tarrant who were responsible for the implementation of

the policies, customs, or guidelines of the City of Tarrant Fire Department relating to duties to rescue and revive persons at fire scenes, procedures for the accountability of employees and agents of the City of Tarrant Fire Department, and procedures to prevent the continued careless, unskillful, negligent and wanton failure to rescue and/or revive persons at fire scenes.

11. Fictitious parties, U, V and W are those persons who were the agents, officers, or employees of the City of Tarrant Fire Department who were responsible for the implementation of the policies, customs, or guidelines of the City of Tarrant Fire Department relating to duties to rescue and revive persons at fire scenes, procedures for the accountability of employees and agents of the City of Tarrant Fire Department, and procedures to prevent the continued careless, unskillful, negligent and wanton failure to rescue and/or revive persons at fire scenes.

FACTUAL ALLEGATIONS

12. The Plaintiff incorporates by reference, as if fully set out herein, Paragraphs 1 through 11 above.

13. On or about December 4, 1993, the dwelling house located at 6017 58th Street North, Tarrant City, Alabama, became engulfed in flames.

14. The structure at the above-referenced address is within the municipality of the City of Tarrant and within the jurisdiction of the City of Tarrant Fire Department.

15. Located in the structure on that date was the decedent, Alberta K. Jefferson, a black woman.

16. As the house was engulfed in flames, the decedent was in a first floor bedroom of the house when members of the Tarrant City Fire Department arrived at the scene.

17. Despite the knowledge of the presence of the decedent in a first floor bedroom of the structure, employees of the City of Tarrant, and/or the City of Tarrant Fire

Department intentionally, wrongfully, wantonly, negligently, carelessly and unskillfully refused to attempt any rescue of the decedent, Alberta K. Jefferson.

18. No other people were in the burning structure on that day, and the defendants present were aware that no other people were in the structure as the house burned.

19. Agents and/or employees of the City of Tarrant and/or the City of Tarrant Fire Department intentionally, wantonly, and/or negligently, carelessly and unskillfully refused to attempt to revive the decedent, Alberta K. Jefferson, when she was carried from the burning dwelling house on December 4, 1993.

20. The proximate result of the intentional, wrongful, wanton, careless and unskilled actions and inactions of the Defendants was the death of the decedent, Alberta K. Jefferson.

21. Plaintiffs Melvin Jefferson, Leon Jefferson, and Benjamin Jefferson, all black men, were at the scene of the fire on December 4, 1993. Melvin and Leon Jefferson are the sons of the decedent, and Benjamin Jefferson is the husband of the decedent.

22. Plaintiffs, Melvin Jefferson, Leon Jefferson, and Benjamin Jefferson, continually pleaded with the defendants to rescue and revive the decedent, Alberta K. Jefferson.

23. The death of Alberta K. Jefferson was caused by the selective denial of fire protection to disfavored minorities, including citizens of the City of Tarrant. This selective denial of fire protection arose out of a pattern and practice of invidious discrimination by the City of Tarrant, Alabama and the City of Tarrant, Alabama Fire Department.

24. On or about January 21, 1994, Melvin Jefferson, as the Administrator of the Estate of Alberta K. Jefferson presented claims for payment to the City of Tarrant and

the City of Tarrant Fire Department for damages arising out of the occurrence described herein.

25. On or about February 11, 1994, Melvin Jefferson in individual capacity, Benjamin Jefferson and Leon Jefferson presented claims for payment to the City of Tarrant and the City of Tarrant Fire Department for damages arising out of the occurrence described herein.

COUNT I

26. The plaintiffs incorporate by reference, as if fully set out herein, paragraphs 1-25 above.

27. The defendants, through their acts or failures to act, caused the death of Alberta K. Jefferson. Said death was caused by the intentional, negligent, wanton, careless and unskilled actions and inactions of the defendants. These acts and failures to act resulted in the decedent's wrongful death under Ala. Code §6-5-41 (1993 Repl. Vol.)

WHEREFORE, PREMISES CONSIDERED, the plaintiffs demand judgment in both compensatory and punitive damages against each defendant, jointly and severally, in the sum of One Million Dollars (\$1,000,000.00), together with interest and the costs of this proceeding.

COUNT II

28. Plaintiffs, Melvin Jefferson, Leon Jefferson, and Benjamin Jefferson, incorporate by reference, as if fully set out herein, paragraphs 1 through 27 above.

29. The actions of the defendants were extreme, outrageous, and beyond all possible bounds of decency so as to cause extreme emotional distress.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs demand judgment in both compensatory and punitive damages against each defendant, jointly and sever-

ally, in the sum of One Million Dollars (\$1,000,000.00), together with interest and the costs of this proceeding.

COUNT III

30. The plaintiffs incorporate by reference, as if fully set out herein, paragraphs 1 through 29 above.

31. This cause of action arises under the authority vested in the Court by virtue of 42 U.S.C. §1983.

32. The City of Tarrant, Alabama, is a municipal corporation existing by virtue of the laws of the State of Alabama, and as a body corporate subject to suit in this court.

33. The City of Tarrant Fire Department exists as an arm of, is organized and exists under the auspices the City of Tarrant, Alabama.

34. Fictitious parties A through W were at all times pertinent hereto, the agents and/or employees of the City of Tarrant, Alabama, an/or the City of Tarrant Fire Department, acting under color of state law.

35. Under federal law, the decedent was protected by the Fourteenth Amendment of the United States Constitution from deliberate indifference to her safety by the agents and/or employees of the City of Tarrant charged with responding to fires within the jurisdiction.

36. That at the time of the fire, it was known, or should reasonably have been known to the persons entrusted with the responsibility of rescuing and reviving victims of fires in the City of Tarrant, that the decedent, Alberta K. Jefferson, was in serious peril and in need of medical attention.

37. Because of the wanton and intentional character of the actions of each individual Defendant, the Estate of Alberta K. Jefferson, through its Administrator, Melvin Jefferson, is entitled to punitive damages under Federal law from each individually named defendant.

38. The actions and inactions of each individually named defendant in their individual and official capacities, constitute such deliberate indifference to Alberta K. Jefferson, that she was deprived of her right to life, as protected by the Fourteenth Amendment of the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs demand judgment against each defendant in both compensatory and punitive damages, jointly and severally, for the full value of Alberta K. Jefferson's life, and the pain, humiliation, and suffering she endured in the amount of One Million Dollars (\$1,000,000.00).

COUNT IV

39. Plaintiffs, Melvin Jefferson, Leon Jefferson, and Benjamin Jefferson, incorporate by reference, as if fully set out herein, paragraphs 1 through 38 above.

40. This cause of action arises under the authority vested in the Court by virtue of 42 U.S.C. §1983.

41. The City of Tarrant, Alabama is a municipal corporation existing by virtue of the laws of the State of Alabama, and as a body corporate is subject to suit in this Court.

42. Fictitious parties A through W were, at all times pertinent hereto, the agents and/or employees of the City of Tarrant, Alabama, and/or the City of Tarrant Fire Department, acting under color of state of law.

43. Under Federal law, the decedent was protected by the Fourteenth Amendment from invidious discrimination by the defendants in failing to rescue or revive her based on race by the agents and/or employees of the City of Tarrant and/or the City of Tarrant Fire Department charged with responding to fires within the jurisdiction.

44. The actions and inactions of the City of Tarrant and the City of Tarrant Fire Department in this case were part of a pattern and practice and custom of denying protective services to disfavored minorities.

45. Because of the intentional actions and inactions of each individual defendant, the Estate of Alberta K. Jefferson through its administrator, Melvin Jefferson, is entitled to punitive damages under Federal law from each individually named defendant.

46. The actions and inactions of each individually named defendant constitute a denial of equal protection of the laws to Alberta K. Jefferson, as protected by the Fourteenth Amendment of the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs demand judgment against each defendant in both compensatory and punitive damages, jointly and severally, for the full value of Alberta K. Jefferson's life, and

the pain, humiliation, and suffering she endured in the amount of One Million Dollars (\$1,000,000.00) .

RESPECTFULLY SUBMITTED,

/s/ Dennis G. Pantazis
Dennis G. Pantazis
Attorney for Plaintiffs

/s/ Brian M. Clark
Brian M. Clark
Attorney for Plaintiffs

OF COUNSEL:

GORDON, SILBERMAN, WIGGINS & CHILDS, P. C.
1400 SOUTHTRUST TOWER
BIRMINGHAM, ALABAMA 35203
(205) 328-0640

THE PLAINTIFFS HEREBY DEMAND TRIAL BY STRUCK JURY.

/s/ Brian M. Clark
Brian M. Clark

Defendants' Addresses:

City of Tarrant
Clerk of the City of Tarrant
P. O. Box 170220
1604 Pinson Valley Parkway
Tarrant, Alabama 35217

City of Tarrant Fire Department
204 Ford Avenue
Tarrant, Alabama 35217

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA R. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
VS.)
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

MOTION TO DISMISS

Come now the Defendants, CITY OF TARRANT, ALABAMA and CITY OF TARRANT, ALABAMA FIRE DEPARTMENT, and move the Court for an order dismissing Plaintiffs' complaint on the following grounds:

1. The Plaintiffs, MELVIN JEFFERSON, individually, LEON JEFFERSON and BENJAMIN JEFFERSON, have no cause of action against either of these Defendants for anything.
2. The complaints of these three in an individual capacity fail to state a claim upon which relief can be obtained.
3. Plaintiffs, MELVIN JEFFERSON, individually, LEON JEFFERSON and BENJAMIN JEFFERSON, claim that they were at the scene of the incident, which was a

fire in which ALBERTA JEFFERSON sustained fatal injuries, and they claim as a result of being there have a cause of action against these Defendants.

4. The Defendants deny that they owed a duty to the deceased and to MELVIN JEFFERSON in his capacity as administrator of the Estate of ALBERTA JEFFERSON to enter a raging inferno and risk their own lives in the remote possibility that anyone located in the building is not already deceased.
5. These Defendants breached no duty that they owed to MELVIN JEFFERSON in his capacity as a administrator of the Estate of ALBERTA JEFFERSON.
6. These Defendants move the Court for an order striking any claim against them in excess of \$100,000.
7. The claim of the Plaintiffs based on outrageous conduct fails to state a claim upon which relief can be obtained.
8. Defendants deny that any of the Plaintiffs have any cause of action against them under 43 U.S.C. § 1983.
9. Defendants deny that the Plaintiffs are entitled to any compensatory damages, as alleged in the complaint, but claim that the only remedy available to the Plaintiffs is under the Alabama Homicide Act.

/s/ John W. Clark, Jr.

JOHN W. CLARK, JR., Attorney for
CITY OF TARRANT, ALABAMA and
CITY OF TARRANT, ALABAMA
FIRE DEPARTMENT

OF COUNSEL:

CLARK & SCOTT, P.C.
3500 Blue Lake Drive, Suite 350
Birmingham, AL 35243-1907
(205) 967-9675

CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of August, 1994 mailed a copy of the foregoing Motion to the following attorneys of record:

Dennis G. Pantazis, Esq.
1400 South Trust Tower
Birmingham, AL 35203

/s/ John W. Clark, Jr.
OF COUNSEL

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA R. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
vs.) Civil Action No.
CITY OF TARRANT, ALABAMA;) CV 94-4523
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

MOTION TO DISMISS

Come now the Defendants, CITY OF TARRANT, ALABAMA and CITY OF TARRANT, ALABAMA FIRE DEPARTMENT, and move the Court for an order dismissing Plaintiffs' complaint on the following grounds:

1. The Plaintiffs, MELVIN JEFFERSON, individually, LEON JEFFERSON and BENJAMIN JEFFERSON, have no cause of action against either of these Defendants for anything.
2. The complaints of these three in an individual capacity fail to state a claim upon which relief can be obtained.
3. Plaintiffs, MELVIN JEFFERSON, individually, LEON JEFFERSON and BENJAMIN JEFFERSON, claim that they were at the scene of the incident, which was a

fire in which ALBERTA JEFFERSON sustained fatal injuries, and they claim as a result of being there have a cause of action against these Defendants.

4. The Defendants deny that they owed a duty to the deceased and to MELVIN JEFFERSON in his capacity as administrator of the Estate of ALBERTA JEFFERSON to enter a raging inferno and risk their own lives in the remote possibility that anyone located in the building is not already deceased.

5. These Defendants breached no duty that they owed to MELVIN JEFFERSON in his capacity as a administrator of the Estate of ALBERTA JEFFERSON.

OVERRULLED
30 days to answer

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
vs.) Civil Action No.
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

ANSWER TO COMPLAINT

The defendants, City of Tarrant, Alabama, a municipal corporation, and City of Tarrant, Alabama Fire Department, a municipal authority, make the following Answer to the Complaint:

First Defense

The defendants deny the material allegations of the Complaint and demand strict proof thereof.

Second Defense

The Complaint fails to state a claim for relief.

Third Defense

The Complaint fails to state a claim for relief under the Fourteenth Amendment to the Constitution or 43 U.S.C. § 1983.

Fourth Defense

The Complaint fails to state a claim for relief under any federal law or provision of the United States Constitution.

Fifth Defense

The Complaint fails to state a claim for relief for outrage.

Sixth Defense

The defendants are "governmental entities" as that term is used in § 11-93-2 Ala. Code, which limits the recovery of damages against a governmental entity to \$100,000.00 for bodily injury or death. Therefore, while the defendants deny that they are liable and that the plaintiffs are entitled to any recovery, pursuant to § 11-93-2, any judgment against the defendants must be limited to \$100, 000. 00.

Seventh Defense

The defendants deny the existence of a duty to protect the plaintiffs or their decedent, under Alabama tort law, on the occasion made the basis of this lawsuit, given the circumstances and dangers at the subject residence.

Eighth Defense

The defendants deny that any action or inaction on their part contributed to or proximately caused the injuries and death or damages made the basis of the Complaint.

Ninth Defense

The defendants plead the affirmative defense of contributory negligence .

Tenth Defense

The defendants affirmatively plead that this action is barred because the plaintiffs failed to file a sworn statement within the time and in the manner required by § 11-47-192 Ala. Code.

Eleventh Defense

The defendants aver that the plaintiffs have not been damaged or injured as alleged in the Complaint.

Twelfth Defense

The defendants aver that they did not breach any duties owed the plaintiffs on the occasion made the basis of this lawsuit.

Thirteenth Defense

The defendants deny that there exists a right to be reserved under the United States Constitution or that actions or inactions of the defendants associated with rescue or attempted rescue may give rise to a cognizable claim under 42 U.S.C. § 1983 or any other federal statute.

Fourteenth Defense

The plaintiffs lack standing.

Fifteenth Defense

The plaintiffs have failed to join a real party in interest or person needed for just adjudication.

Sixteenth Defense

The defendants aver that any award of punitive damages to the plaintiffs would be in violation of the constitu-

tional safeguards provided to them under the Constitution of the State of Alabama.

Seventeenth Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case would be in violation of the constitutional safeguards provided to them under the Constitution of the United States of America.

Eighteenth Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case would be in violation of the constitutional safeguards provided to them under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that punitive damages are vague and are not rationally related to legitimate government interests.

Nineteenth Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case would be in violation of Article I, Section 6 of the Constitution of State of Alabama which provides that no person shall be deprived of life, liberty or property except by due process of law, in that punitive damages are vague and are not rationally related to legitimate government interests.

Twentieth Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case would be in violation of the procedural safeguards provided to them under the Sixth Amendment to the Constitution of the United States in that punitive damages are penal in nature and, consequently, it is entitled to the same procedural safeguards accorded to criminal defendants.

Twenty-first Defense

The defendants aver that it is in violation of the self-incrimination clause of the Fifth Amendment to the Constitution of the United States of America to impose punitive damages against it, which are penal in nature yet compel it to disclose potentially incriminating documents and evidence.

Twenty-Second Defense

The defendants aver that it is in violation of the rights guaranteed by the Constitution of the United States of America and the Constitution of the State of Alabama to impose punitive damages against them which are penal in nature by requiring a burden of proof on the plaintiffs which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases.

Twenty-Third Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case would be in violation of the Eighth Amendment to the Constitution of the United States of America in that the damages would be an excessive fine in violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

Twenty-Fourth Defense

The defendants aver that any award of punitive damages to the plaintiffs in this case will be violative of Article I, Section 15 of the Constitution of the State of Alabama 1901 in that the damages would be an excessive fine.

Twenty-Fifth Defense

The plaintiffs' claim for punitive damages violates the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments

of the Constitution of the United States, on the following separate and several grounds:

- (a) It is a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution to impose punitive damages, which are penal in nature, against a civil Defendant without the Plaintiff satisfying a burden of proof which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases;
- (b) The procedures pursuant to which punitive damages are awarded fail to provide a reasonable limit on the amount of an award against the Defendant, which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;
- (c) The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages which thereby violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;
- (d) The procedures pursuant to which punitive damages are awarded result in the imposition of different penalties for the same or similar acts and, thus, violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;
- (e) The procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct, which thereby infringes the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution;

- (f) The procedures pursuant to which punitive damages are awarded permit the imposition of excessive fines in violation of the Eighth Amendment of the United States Constitution.

Twenty-Sixth Defense

The plaintiffs' claim for punitive damages violates the Due Process Clause of Article 1, Section 6 of the Constitution of Alabama on the following separate and several grounds:

- (a) It is a violation of the Due Process Clause to impose punitive damages, which are penal in nature, upon a civil Defendant without the Plaintiff satisfying a burden of proof less than the "beyond a reasonable doubt" burden of proof required in criminal cases;
- (b) The procedures pursuant to which punitive damages are awarded fail to provide a limit on the amount of the award against the defendants;
- (c) The procedures pursuant to which punitive damages are awarded are unconstitutionally vague;
- (d) The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of punitive damages;
- (e) The award of punitive damages in this case would constitute deprivation of property without due process of law;
- (f) The procedures permit the award of punitive damages without satisfaction of a reduced standard of proof;
- (g) The procedures fail to provide a clear and consistent appellate standard of review of an award of punitive damages;
- (h) The procedures permit the admission of evidence relative to punitive damages in the same proceed-

ings during which liability and compensatory damages are determined;

Twenty-Seventh Defense

The award of punitive damages to the plaintiffs in this action would constitute a deprivation of property without due process of law required under the Fifth and Fourteenth Amendments of the United States Constitution.

Twenty-Eighth Defense

The procedures pursuant to which punitive damages are awarded permit the imposition of an excessive fine in violation of Article 1, Section 15 of the Constitution of Alabama.

Twenty-Ninth Defense

The defendants reserve the right to add any additional defenses that discovery would reveal to be available.

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

Attorney for CITY OF TARRANT,
ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

OF COUNSEL:

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(205) 967-9675

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing Answer to the following attorneys of record on June 16, 1995:

Dennis G. Pantazis, Esq.
1400 SouthTrust Tower
Birmingham, AL 35203

/s/ Wayne Morse
OF COUNSEL



IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA R. JEFFERSON;)
LEON JEFFERSON AND BENJAMIN)
JEFFERSON,)
Plaintiffs,)
v.) Civil Action No.:
CITY OF TARRANT, ALABAMA;) CV 94-4523
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT)
Defendants.)

MOTION FOR SUMMARY JUDGMENT

John W. Clark, Jr.
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3500 Blue Lake Drive Suite 350
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(205) 967-9675

Attorneys for City of Tarrant, Alabama and
City of Tarrant, Alabama Fire Department

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
vs.) Civil Action No.:
CITY OF TARRANT, ALABAMA;) CV 94-4523
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants, City of Tarrant, Alabama ("Tarrant City"), a municipal corporation, and City of Tarrant, Alabama Fire Department ("Tarrant Fire Department"), move the court to enter an Order granting a summary judgment in their favor and dismissing this action, pursuant to Rule 56, A.R.Civ.P. As grounds, Tarrant and the Tarrant Fire Department state that no genuine issue of material fact exists, and they are entitled to a judgment as a matter of law. In further support of this Motion, Tarrant and the Tarrant Fire Department offer the following: (a) Complaint; (b) Answer; (c) Alabama Certificate of Death for Alberta R. Jefferson; (d) the Affidavit of Kelly Bryant, Tarrant Fire Department; (e) Tarrant Fire Report for fire at Jefferson residence; (f) pages from deposition of Melvin Jefferson; (g) pages from deposition of Leon Jefferson; (h) pages from deposition of Ben Jefferson; (i) citation of legal authority.

Preliminary Statement

Alberta R. Jefferson met a tragic death in a house fire. Her husband and two of her sons have brought this lawsuit alleging that she died as a result of the wrongful conduct of Tarrant City and its Fire Department; and, that she was deprived of her constitutional rights to life and fire protective services. In addition, the plaintiffs seek damages for outrage in their individual capacities.

As a matter of law, there is no affirmative constitutional right to life or rescue services. Moreover, with respect to the wrongful death claim, the plaintiffs are unable to show that Ms. Jefferson died as a result of any conduct on the part of the defendants because the fire fighters and paramedics arrived at the scene four minutes after receiving the call. The coroner concluded that Ms. Jefferson was injured before the Tarrant Fire Department received the call. She was not alive, when checked by a paramedic, after being taken from the fire just moments after the Tarrant Fire Department arrived. Under these circumstances, the plaintiffs do not state a cognizable claim for relief. Accordingly, as a matter of law, the defendants are entitled to a judgment and dismissal of all claims.

Procedural History

This action arises out of a fire at a residence at Tarrant on December 4, 1993. The Complaint seeks compensatory and punitive damages for the wrongful death of Alberta K. Jefferson based on the following legal theories: (1) Count I, wrongful death of Ms. Jefferson allegedly caused by the "intentional, negligent, wanton, careless and unskilled actions or inactions of the defendants"; (2) Count III, pursuant to 42 U.S.C. § 1983, deprivation of life, protected by the Fourteenth Amendment to the United States Constitution; (3) Count IV, under the Fourteenth Amendment, for a denial of equal protection

and invidious discrimination in failing to rescue or to revive Alberta K. Jefferson based on race. In addition, in their individual capacities, the plaintiffs seek compensatory and punitive damages for outrage in Count II.

The Complaint alleges factually that on December 4, 1993, the subject residence "became engulfed in flames"; that the residence was within Tarrant and the jurisdiction of the Tarrant Fire Department; that the decedent, Alberta K. Jefferson, was a black woman and within the residence on that date; that the decedent was in a first floor bedroom when members of the Tarrant Fire Department arrived at the scene. Further, plaintiffs aver that Tarrant and Tarrant Fire Department employees wrongfully "refused to attempt any rescue of the decedent" and "refused to attempt to revive the decedent." According to the Complaint:

The death of Alberta K. Jefferson was caused by the selective denial of fire protection to disfavored minorities, including citizens of the City of Tarrant. This selective denial of fire protection arose out of a pattern and practice of invidious discrimination by the City of Tarrant, Alabama Fire Department.

In their Answer, the defendants plead the following defenses: (a) the plaintiffs fail to state a claim for relief under the United States Constitution or 42 U.S.C. § 1983; (b) there is no constitutional right to be rescued by the government or, in this instance, Tarrant and the Tarrant Fire Department; (c) denial of a breach of duty under Alabama tort law; (d) lack of proximate cause; (e) contributory negligence; (f) failure to state a claim for outrage; (g) general denial; (h) recovery of punitive damages would be violative of constitutional safeguards.

Narrative Summary of Undisputed Facts

1. Ms. Alberta K. Jefferson died on December 4, 1993 at 6017 58th Street North, Tarrant City, Alabama as a result of smoke inhalation at her residence; she received her fatal injury at approximately 9:40 p.m. and was pronounced dead at 9:50 p.m. *See Exhibit A*, Alabama Certificate of Death for Alberta K. Jefferson (completed by Gary T. Simmons, M.D., Associate Chief Coroner and Medical Examiner).

2. Ms. Jefferson's residence was wood frame, one-story, under 3,000 square feet and had no building alarm system. *See Exhibit B1*, Tarrant Fire Department Report.

3. The Tarrant Fire Department received a call about the Jefferson residence being in flames at 9:45 p.m.; its personnel arrived at the Jefferson residence at 9:49 p.m. *See Exhibit B, supra*; *see also Exhibit C*, Depo. Phillip Bennett, Tarrant Fireman and Paramedic, pp. 38-41, 51.

Applicable Authority and Analysis

A. Summary Judgment Standard

Under Rule 56, A.R.Civ.P., summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Altadena Valley Golf & Country Club v. Blue Cross and Blue Shield of Alabama*, 644 So.2d 913, 915 (Ala. 1994). In order to defeat a defendant's properly supported summary judgment motion, the plaintiff must present "substantial evidence," i.e., "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *Id.* Once the movant makes a prima facie showing that no genuine issue of material fact exists, the burden shifts to the nonmovant to show "substantial evidence" in support of his or her position. *Id.*

B. The plaintiffs fail to state a claim for relief under the Fourteenth Amendment to the United States Constitution.

Under 42 U.S.C. § 1983, damages are sought in Count III for the deprivation of Ms. Jefferson's "right to life, as protected by the Fourteenth Amendment." In Count IV, the plaintiffs seek damages for a "denial of equal protection of the laws to Alberta K. Jefferson, as protected by the Fourteenth Amendment." Although the law applicable to each Count overlaps, each claim will be analyzed separately.

Section 1983 itself creates no substantive rights; it merely provides a remedy for deprivation of federal rights established elsewhere. *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1032 (11th Cir. 1987). To establish the liability of a local government entity under § 1983, a plaintiff must establish three elements: (1) that he suffered a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States; (2) that the act or omission causing the deprivation was committed by a person acting under color of law; and (3) that the constitutional deprivation resulted from a custom, policy or practice of the municipality. *Id.* (citing *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037 (1978)). "[P]roof of a single, isolated incident of unconstitutional activity generally is not sufficient to impose municipal liability under *Monell*." *Id.*

1. Due process claims.

Although pleaded generally, Count III appears to assert that Tarrant and the Tarrant Fire Department deprived Ms. Jefferson of her life, without due process of law, in violation of the Fourteenth Amendment, because their employees failed to rescue and to revive her. *See* Complaint, paragraph 36. The Due Process Clause provides that "[n]o State shall . . . deprive any person of life,

liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998 (1989), the Supreme Court stated:

The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security . . .

Consistent with these principles, our cases have recognized that the Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

DeShaney, 489 U.S. at 195-96, 109 S.Ct at 1003.

There are exceptions to this rule. Liability may attach where the government takes the person into custody and holds him there against his will. *DeShaney*, 489 U.S. at 199, 109 S.Ct. at 1005; *see also Wright v. Bailey*, 611 So.2d 300 (Ala. 1992) (holding that deputy sheriffs were not liable in § 1983 action for alleged due process violation for failing to arrest intoxicated driver absent custodial relationship with motorist or intoxicated driver). For an affirmative duty requiring state protection to exist, there must be a "special relationship," which arises when the state so limits the victim's liberty that he is unable to care for himself. *DeShaney*, 489 U.S. at 200, 109 S.Ct. at 1005; *Wright*, 611 So.2d at 305.

"Where the state merely fails to protect an individual, and no special relationship or special danger exists, the failure may be actionable under a state common law theory, but not under the Due Process Clause." *Wright*, 611 So.2d at 305. Therefore, under *DeShaney* and *Wright*, even if one assumes that employees of Tarrant and the

Tarrant Fire Department were negligent in failing to revive and to resuscitate Ms. Jefferson, "mere negligence is not enough to implicate the Due Process Clause." *Id.* For Ms. Jefferson's personal representative to maintain a § 1983 action against Tarrant or the Tarrant Fire Department, his evidence must establish either that Tarrant or the Tarrant Fire Department acted affirmatively to deprive Ms. Jefferson of her life or that, by virtue of a special relationship or special danger, Tarrant and the Tarrant Fire Department had a constitutional duty to protect Ms. Jefferson from a residential fire. *See id.* The Due Process Clause of the Fourteenth Amendment is not implicated because Ms. Jefferson was not incarcerated or institutionalized; therefore, summary judgment is proper. *W. L. O. v. Smith*, 585 So.2d 22, 25 (Ala. 1991).

"There is no constitutional right to be rescued by the government, and inept rescue is not a cognizable theory for due process liability under § 1983." *Culver-Union Township Ambulance Service v. Steindler*, 629 N.E.2d 1231, 1234 (Ind. 1994) (citing *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. den'd*, 465 U.S. 1049, 104 S.Ct. 1325 (1984)). In *Steindler*, the plaintiff sought damages under § 1983 for violations of her decedent's constitutional rights for her decedent's death. Personnel from the Culver-Union Township Ambulance Service responded to an emergency call and provided treatment for the decedent's heart attack. The Supreme Court of Indiana held that the trial court correctly granted the defendant's motion for judgment on the pleadings. The court noted that the decedent had not been placed in custody by the government. Citizens do not "enjoy a right to protection of life under the 14th Amendment." *Steindler*, 629 N.E. 2d at 1235. "The 14th Amendment does not require government to provide rescue services." *Id.*

The Seventh Circuit reached the same result earlier. In *Jackson v. Byrne*, 738 F.2d 1443 (7th Cir. 1984), the parents of two children who died in a fire brought a § 1983 action for deprivation of rights guaranteed under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution against the City of Chicago Fire Department and others. The lawsuit arose out of an incident which occurred while the fire fighters were on strike. Four fire fighters assisted a dispatched crew in extinguishing the blaze, but despite their efforts the children lost their lives. In holding that the children had no positive entitlement to be rescued from the fire, the court discussed the general law regarding rescues and constitutional rights.

This court has repeatedly stated that plaintiffs who have suffered tortious injury are not entitled to Section 1983 relief merely because the defendant is a government official . . . Section 1983 imposes liability only for violation of rights secured by the Constitution or federal law . . . Accordingly, the starting point in an analysis of a Section 1983 claim is the isolation of the specific federal right that plaintiff claims defendant violated when acting under color of state law.

Appellants claim that the facts in this case implicate the Fourteenth Amendment's protection against deprivation of life or property without due process, but that position is untenable. Although there were deaths in this case, the state did not, within the meaning of the Fourteenth Amendment, "deprive" plaintiffs' decedents of life. The fire killed Santana and Tommie Jackson, government officials did not. Our analysis would no doubt be different if government officials set the fire or placed forces in motion which ignited the fire that claimed the lives of the Jackson children.

Appellants respond with a second theory under which the city deprived Santana and Tommie Jackson of life. They contend that even if government officials did not put a match to the North Ridgeway residences, the city did fail adequately to protect plaintiffs' decedents from a fire of independent origins. Hence the district court, appellants maintain, incorrectly rendered summary judgment because a trial could have rendered summary judgment because a trial could have established a causal connection between the omission and the deaths. Appellants' argument fails to persuade us. Not every death that results from the state's failure to act is a "depriv[ation]" under the Fourteenth Amendment. Before an omission that leads to a death is actionable under the Fourteenth Amendment and Section 1983, the Constitution must recognize an underlying duty on the part of the state to act.

We have elsewhere stated that nothing in the Constitution requires governmental units to act when members of the general public are imperiled, *see Beard v. O'Neal*, 728 F.2d 894 (7th Cir. 1984); *Jackson, supra*, and we need only briefly summarize our position here. In our opinion, "the Constitution is a charter of negative liberties; it tells the [government] to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." *O'Neal, supra*, at 899, quoting *Bowers, supra*, at 618. Thus, when the Chicago fire fighters carried out their strike threat and left the city with a fraction of its former protective work force, they did not omit to perform a duty required of them by the Constitution. The Constitution creates no positive entitlement to fire protection.

Jackson, 738 F.2d at 1445-46; *see also Wideman*, 826 F.2d at 1032 (holding that there is “no general right based upon either the Constitution or federal statutes, to the provision of medical treatment and services by a state or municipality.”)

Because Ms. Jefferson was not in the custody of Tarrant and the Tarrant Fire Department, no special relationship arose. Despite the tragedy of her death, Ms. Jefferson had no constitutional right to life or fire protection. More importantly, the fire killed Ms. Jefferson, not the Tarrant Fire Department. Accordingly, her personal representatives have no cognizable claim under § 1983 for violations of federal statutes or constitutional provisions. Tarrant and the Tarrant Fire Department are entitled to a judgment as a matter of law and a dismissal.

2. Equal protection claims .

Count IV of the Complaint seeks damages for denial of equal protection of the laws. Specifically, the Complaint alleges that the “actions and inactions” of Tarrant and the Tarrant Fire Department “were part of a pattern and practice and custom of denying protective services to disfavored minorities.”

The Fourteenth Amendment’s Equal Protection Clause provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Only intentional or deliberate discrimination, not mere negligent conduct, violates equal protection. *Rickett v. Jones*, 901 F.2d 1058, 1060-61 (11th Cir. 1990); *Jackson*, 715 F.2d at 1203. Such discrimination is not alleged in the Complaint. The Complaint does mention intentional acts in Count IV; however, it does so in connection with an explanation of why the personal representative says that the estate of Ms. Jefferson is entitled to punitive damages. No allegation of intentional or deliberate discrimination is made in the

Complaint. Therefore, no claim for relief for violation of the Equal Protection Clause is alleged; Tarrant and the Tarrant Fire Department are entitled to a judgment as a matter of law. *See Jackson*, 715 F.2d at 1203 (holding that failure to allege deliberate discrimination entitled defendants to dismissal for failure to state a claim under Rule 12(b)(6)).

Several federal circuit courts have held that if a plaintiff, such as Ms. Jefferson’s personal representative, has a claim, it is under the Due Process Clause and not the Equal Protection Clause. According to the Eleventh Circuit: “If such a right [under either the Constitution or federal statutes to medical treatment and services by a municipality] exists at all, it *must* derive from the Fourteenth Amendment’s Due Process Clause, which forbids a state to deprive anyone of life, liberty or property without due process of law.” *Wideman*, 826 F.2d at 1032-33. Similarly, the Seventh Circuit has held: “If the plaintiffs have a claim it is under the Fourteenth Amendment’s Due Process Clause, which forbids the state to deprive anyone of life, liberty, or property without due process of law.” *Jackson*, 715 F.2d at 1203.

The Seventh Circuit has acknowledged in discussion that it is possible to allege a claim for denial of equal protection in the context presented. *Jackson*, 715 F.2d at 1203 (“If the defendants had withheld protection from the plaintiffs’ decedents because they were blacks or members of some other vulnerable minority - if the defendants were discriminatory in a vicious or irrational fashion there would be an equal protection issue.”) However, no such allegation is made here.

More importantly, the plaintiffs are unable as a matter of law to prove an equal protection violation. To establish an equal protection clause violation, a plaintiff must demonstrate that a challenged action was motivated by an intent to discriminate. *Elston v. Talladega County Board*

of Education, 997 F.2d 1394, 1406 (11th Cir. 1993). "Discriminatory intent may be established by evidence of such factors as substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and discriminatory statements in the legislative or administrative history of the decision." *Id.*

Even if the Complaint stated a claim for relief for violation of the Equal Protection Clause, the plaintiffs would be unable to produce evidence of such a claim. At his deposition, the decedent's husband, plaintiff Ben Jefferson, testified:

Q. Is there anything that makes you think that they didn't come out there that quickly just because you were black?

A. I can't tell you that either. I know one thing, they took their time coming out there. And I didn't have any help from either one of them to help me get my wife out.

Q. Do you have any information or any knowledge or any facts to show that they denied services to your or your family because that you were black?

A. No, they didn't. That is all I can say. They didn't help me get my wife out, because I was standing here as close as from me to you when I asked him.

Q. There are other black families than you folks that live there in Tarrant, isn't there?

A. Yes.

Q. To your knowledge, have any of them had any problems of any type with the Tarrant Fire Department?

A. Not that I know of, because ain't nobody else's house got burned up as far as I know anything about.

Q. Have any of the others needed emergency services of any type where they might have called the Tarrant Fire Department?

A. Not that I know of.

Q. You don't know of anything that would indicate to you that fire protection was denied to you or any other black families out in Tarrant just because y'all were black and not white?

A. I don't know.

See Exhibit D, Depo. Ben Jefferson, pp. 61-63.

Ms. Jefferson's son and personal representative, Melvin Jefferson, also testified as to this issue:

Q. All right, sir. Now, do you have any information from any source that the City of Tarrant denied services or protection to any minority groups?

A. To the best of my knowledge as far as I can remember - to any minority groups?

Q. Yes, sir. Blacks, Hispanics, anyone other than, I guess, white male, is a minority group.

A. I don't. I don't. I know one other incident where a fire occurred in our neighborhood.

Q. What was that incident?

A. There was a fire at Ms. Pugh's house. It is on the next block, around the corner on the next block from my mother's house.

Q. Do you know how long ago it was that a fire occurred?

A. I can't remember.

Q. Just to get some kind of frame, five years, ten years, twenty?

A. I can't remember. Five. I can't remember.

Q. Ms. Pugh, would that be the mother of the gentleman you talked to out there about this?

A. The grandmother.

Q. What was there about that fire that led you to the conclusion that the Fire Department wasn't providing services to her?

A. The house was destroyed.

Q. Was there any indication that you got from her that the Fire Department was slow in getting there or did something improperly in putting the fire out?

A. I never talked to Ms. Pugh directly.

Q. Who did you talk to?

A. I heard it from talking with my brother.

Q. We talked about your brother. Is that your brother that is here in the room with us now, Leon Jefferson?

A. Yes.

Q. What did he tell you?

A. We had conversations about the fire at Ms. Pugh's house.

Q. All right. What did he tell you about it, specifics?

A. Her house was destroyed.

Q. All right. Did he tell you that the Fire Department was called and they did not come out there?

A. Her house was destroyed, I mean it - they were slow in getting there, too. The Fire Department was slow in getting to Ms. Pugh's house, also.

Q. Were any criticisms of the Fire Department given to you by your brother or anyone else on the Pugh fire other than the fact they were slow in getting there?

A. Not that -- other people saying it? Not that I can recall.

Q. Do you yourself have any other facts that indicate to you that the City of Tarrant Fire Department has been denying fire protection to you or anyone else in Tarrant because they are a minority group?

A. No, other than the incidents that described that -- these things that we talked about.

Q. The incident that occurred to your mother and the incident that occurred to Ms. Pugh?

A. As best that I can remember.

Q. All right. Do you have any other information yourself that the City of Tarrant in any way refused to provide services or deny services to any minority groups other than what you have told me about?

A. The best I can remember, no.

See Exhibit E, Depo. Melvin Jefferson, pp. 41-45.

Another plaintiff, Leon Jefferson, provided the following testimony:

Q. Now, have you talked with anybody or do you have any information that the City of Tarrant out there denied fire protection to people out there because they were minorities or blacks?

A. Well, Tarrant, from the Pugh incident that occurred maybe in '90 or '91. You have that in your interrogatory questions, Ms. Pugh, the year the fire started and everything. She stated the fact that they were somewhat slow about getting to her house when her house caught on fire. They were very slow. They were very sluggish. Said she could have put out the fire herself probably at the time they got out there, you know, and she would probably tell you the same.

Q. Any other incidents that you are aware of that anybody has told you about or that you personally know other than the Pugh incident?

A. No, nothing other than the Pugh incident. And from that pattern the sluggishness, the slowness, from that pattern in that area, just only blacks in that area, on 58th, 59th, 57th. There is no other area that blacks are in, on that pattern, they are slow and sluggish and did not do a sufficient job.

Q. You think they are slow and sluggish because of the problem Ms. Pugh had at her house and because you think it took them a long time to get to your parents' house?

A. From that pattern, that, and then from the same pattern that occurred some four or five years later after Ms. Pugh's incident. They was very slow and very sluggish, not efficient. They didn't perform a distinguish job.

Q. All right. You talked about an incident four or five years after Ms. Pugh. Is that what you are talking about?

A. Ms. Pugh and my parents. That is what I am talking about.

Q. All right. Any other incidents other than those two incidents of which you are aware?

A. No. Q. Do you have any information that they, that the people out there just deny fire protection services to members of minority groups other than what you have told me about?

A. Other than nothing but what I told you about. That is all that I know.

Q. All right. And any statements that you made that they just don't provide fire protection to blacks or minorities based on the problems that you had at your house or our mom and dad's house -

A. Right.

Q. -- has anybody else told you of any problem they have had with the Tarrant Fire Department or the Tarrant Police Department of any type?

A. I just heard some years ago back they were slow when it come to black people, period. I just heard that maybe from some people in the area. I don't know of any names that I can recall. From the Pugh pattern to the Jefferson pattern, I found that to be kind of true.

See Exhibit F, Depo. Leon Jefferson, pp. 54-58.

Most of the testimony offered by the plaintiffs at their depositions in response to discrimination by Tarrant and the Tarrant Fire Department is not admissible evidence because it is hearsay or not a product of the witness's personal knowledge. "Evidence that is not admissible at trial can not be considered on a motion for summary judgment." *Yarbrough v. Springhill Memorial Hosp.*, 545 So.2d 32, 34 (Ala. 1989). Because the plaintiffs are unable to prove any actions by Tarrant or Tarrant Fire Department, summary judgment and dismissal are proper.

B. State Tort Law Claims

1. Wrongful Death.

In *Williams v. City of Tuscumbia*, 426 So.2d 824 (Ala. 1982), the Alabama Supreme Court recognized a claim for relief against a municipality for negligence in failing to respond immediately to a call about a house fire.

Once a city or town organizes and provides for a fire department, what is the duty owed to the citizens of the city or town? Tuscumbia contends that a duty imposed upon a municipal fire department is owed to the general public - not to an individual. Does this mean that the whole town has to be on fire before the fire department responds to a call? It may be true that a certain fire in the city would have priority over another fire. For example, if a multi-story building was on fire and in it a number of people were stranded and about to suffer imminent death from the fire, it could hardly be questioned that the fire inside the multi-story building would have priority over a fire in a dwelling where only property damage would be suffered.

We opine that in this case a duty was imposed on the Tuscumbia Fire Department to respond immediately to the call that the Williams's house was on fire. There was a special duty created to act in a skillful manner to respond to the call. We recognize the fact that firemen may act in a skillful manner to respond to the call. We recognize the fact that firemen may act with extreme skillfulness and yet be unable to get to a fire to prevent a building from burning to the ground. But, here the complaint alleges that the reason the fire department did not immediately respond was that the driver of the truck had gone home sick and had not been replaced. We opine that the fire department acted

unskillfully by not having a back-up driver who could have immediately taken the place of the sick driver, § 11-47-190, Code of Alabama 1975. In other words, the fire department lacked proficiency. Cf. *City of Birmingham v. Thompson*, 404 So.2d 589 (Ala. 1981).

Williams, 426 So.2d at 825-26.

In the case presented, the plaintiffs are unable to show that Tarrant and the Tarrant Fire Department acted tortiously, i.e., breached a duty to respond immediately to the call that the Jefferson residence was on fire, or failed to act skillfully in responding to the call. The depositions and death certificate reveal the following chronology of events on December 4, 1993:

- 9:40 p.m. — Ms. Jefferson receives fatal injury.
- 9:45 p.m. — Tarrant Fire Department receives call that Jefferson residence is on fire.
- 9:49 p.m. — Tarrant Fire Department arrives at Jefferson residence.
- 9:50 p.m. — Ms. Jefferson is pronounced dead after being pulled from the fire; her pulse and airways and pupils are checked.

See Exhibits A and B1, supra; see also Exhibit C, Deposition of Phillip Bennett, pp. 38-41. There is no evidence of any delay here as there was in *Williams*. The Tarrant Fire Report indicates that fire fighters and paramedics arrived at the scene four minutes after receiving the call. *See Exhibit C, Depo. Bennett, p. 51.* This fact has not been disputed.

As a matter of law, the circumstances presented do not give rise to a cognizable claim. In *Lane v. Town of Columbia*, 474 So.2d 1073 (Ala. 1985), the Alabama Supreme

Court upheld a summary judgment in favor of a municipality in a case in which the EMT crew arrived seventeen minutes after receiving the call. Like the plaintiffs in the case sub judice, the plaintiff in *Lane* sued as personal representative for the wrongful death of his intestate and individually for the tort of outrage. The court stated: "We are unable to perceive these facts as furnishing a reasonable inference supporting any cognizable claim against any of the defendants in favor of either of the plaintiffs." *Lane*, 474 So.2d at 1075.

In comparison, Tarrant fire fighters arrived in four minutes at the Jefferson residence. Based on *Lane*, the plaintiffs in the case presented have no cognizable claim for wrongful death or outrage. That Tarrant and the Tarrant Fire Department are entitled to a judgment as a matter of law is underscored when one considers that *Lane* was decided under the "scintilla" rule. § 12-21-12 Ala. Code; *Morris v. Birmingham Southern R. Co.*, 545 So.2d 34 (Ala. 1989). The Jefferson plaintiffs lack not only "substantial" evidence but a "scintilla" of evidence as well.

In addition, the evidence indicates that Ms. Jefferson received fatal injuries before the Tarrant Fire Department received the call. The death certificate indicates that Ms. Jefferson was injured at 9:40 p.m. A death certificate "is prima facie evidence of facts therein stated." *Nelson v. Lee*, 249 Ala. 549, 556, 32 So.2d 22 (1947). Neither of Ms. Jefferson's sons, both of whom were at the scene, knows whether Ms. Jefferson was living or dead when she was taken out of the house. *See Exhibit F, Depo. Leon Jefferson*, p. 37; *see also Exhibit E, Depo. Melvin Jefferson*, p. 41. Because the plaintiffs are unable to rebut the time of Ms. Jefferson's death, the time stated by Dr. Simmons in the death certificate must be deemed conclusive. *Liberty Nat'l Life Ins. Co. v. Reid*, 276 Ala. 25, 34, 158 So.2d 667 (1963).

In Alabama, a wrongful death action "comes into being only on death from wrongful act." *Geohagan v. General Motors Corp.*, 291 Ala. 167, 171, 279 So.2d 436 (1973). In this instance, the plaintiffs are unable to show that any breach of duty or any unskillful act contributed to cause Ms. Jefferson's death. Inasmuch as Ms. Jefferson was fatally injured before the Tarrant Fire Department even received the call, no action or inaction on the part of the fire fighters could have caused her death. Tarrant and the Tarrant Fire Department are entitled to summary judgment.

2. Outrage

Although pleaded in generalities, Count II of the Complaint appears to assert damages for outrage for the plaintiffs in their individual capacities. The tort of outrage requires extreme and outrageous conduct by a person who intentionally or recklessly causes severe emotional distress to another. *Nipper v. Variety Wholesalers, Inc.*, 638 So.2d 778, 780 (Ala. 1994). There must be evidence to show that the defendant's conduct is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. *Id.*

In *Lane*, the Alabama Supreme Court upheld a summary judgment for the defendant municipality under similar facts and determined there was no outrageous conduct as a matter of law. *Lane*, 474 So.2d at 1075. Analogously, Alabama does not recognize negligent infliction of emotional distress. *Gideon v. Norfolk Southern Corp.*, 633 So.2d 453 (Ala. 1994). Likewise, Alabama does not allow bystander recovery. *Id.*; *Slovensky v. Birmingham News Co. Inc.*, 358 So.2d 474, 477 (Ala. Civ. App. 1978) ("Concerning mental anxiety or distress, the law in Ala-

bama does not permit recovery for mental distress because of a wrong to another.”)

The plaintiffs are unable to produce evidence that Tarrant Fire Fighters “intentionally” or “recklessly” caused them severe emotional distress or that any conduct on their part was extreme and outrageous. Naturally, the plaintiffs, the deceased’s husband and sons, would be emotionally wrought over her death. But the facts presented - that the Tarrant fire fighters did not administer C.P.R. to Ms. Jefferson after checking her pulse and heartbeat and determined that she was not alive - do not give rise to a cognizable claim for outrage. *Lane*, 474 So.2d at 1075.

3. Statutory Notice

§ 11-47-192 Ala. Code provides:

No recovery shall be had against any city or town on a claim for personal injury received, unless a sworn statement be filed with the clerk by the party injured or his personal representative in case of his death stating substantially the manner in which the injury was received, the day and time and the place where the accident occurred and the damages claimed.

Itemization of damages is unnecessary in a wrongful death case. *Town of Athens v. Miller*, 190 Ala. 82, 66 So.2d 702 (1914). However, in a lawsuit for personal injuries, the claimant is required to state the dollar amount of damages sought in his statutory notice preceding the initiation of the lawsuit. *City of Montgomery v. Weldon*, 280 Ala. 463, 466, 195 So. 110 (1967) (holding that notice did not satisfy statutory requirement because plaintiff “had not stated the amount of damages claimed.”) A plaintiff’s recovery is limited to the amount claimed in the notice filed with the municipality. *Perrine v. Southern Bitulithic Co.*, 190 Ala. 96, 66 So. 705, 706 (1914).

The notices filed by the plaintiffs, Ben Jefferson¹, Melvin Jefferson², and Leon Jefferson³ are defective. See Exhibit C5,

¹Please be advised this letter is to put you on notice that as the husband of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Alberta R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my wife out of the house, which they refused to give. I hereby make demand for damages on behalf of the Estate in the clause of her wrongful death caused by the Fire Department of Tarrant.

²Please be advised this letter is to put you on notice that as Executor of the Estate of Alberta R. Jefferson I am claiming personal injury, mental anguish, conduct so outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Alberta R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I hereby make demand for damages on behalf of the Estate in the clause of her wrongful death caused by the Fire Department of Tarrant.

Please be advised this letter is to put you on notice that as the son of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Alberta R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my mother out of the house, which they refused to give. I hereby make demand for damages on behalf of the Estate in the clause of her wrongful death caused by the Fire Department of Tarrant.

³Please be advised this letter is to put you on notice that as son of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Alberta R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my mother out of the house, which they refused to give.

Notice of Ben Jefferson; Exhibit C4, Notices of Melvin Jefferson; Exhibit C6, Notice of Leon Jefferson. Although each of the Notices may seek damages for outrage for the plaintiffs individually, none of the Notices contain a statement of the amount of damages sought.

/s/ Wayne Morse

John W. Clark, Jr.
 Wayne Morse
 Attorneys for CITY OF TARRANT,
 ALABAMA and CITY OF TARRANT,
 ALABAMA FIRE DEPARTMENT

OF COUNSEL:

CLARK & SCOTT, P.C.
 3500 Blue Lake Drive, Suite 350
 Birmingham, AL 35243-1907
 (205) 967-9675

NOTICE OF HEARING

This Motion for Summary Judgment is set before the Honorable Drayton N. James, Circuit Court Judge, Jefferson County, on July 7, 1995 at 11:00 a.m.

I hereby make demand for damages on behalf of the Estate in the clause of her wrongful death caused by the Fire Department of Tarrant.

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered a copy of the foregoing Motion for Summary Judgment to the following attorney of record on June 24, 1995:

Dennis G. Pantazis, Esq.
 1400 SouthTrust Tower
 Birmingham, AL 35203

/s/ Wayne Morse
 OF COUNSEL

This is an exact copy of the record on file with
the Jefferson County Health Department.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
vs.) Civil Action No.
CITY OF TARRANT, ALABAMA;)
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

AFFIDAVIT OF STEPHEN WAYNE HALL

My name is Stephen Wayne Hall. I am a Lieutenant with the Fire Department for the City of Tarrant, Alabama, a defendant in the above-styled lawsuit. I am over nineteen years of age and competent to testify to the matters contained in this Affidavit, which I understand will be used in support of summary judgment for the City of Tarrant, Alabama, and the Fire Department for the City of Tarrant, Alabama.

1. Among other duties at the Tarrant Fire Department, it is my responsibility to maintain records and documents pertaining to fire protection services.
2. The Tarrant Fire Department maintains records and documents in the regular course of business.
3. It is part of the regular course of business for the Tarrant Fire Department to maintain records and documents.

BEST AVAILABLE COPY

4. The Tarrant Fire Department maintains the following records and documents in the regular course of business:

- a. Report on fire at 6017 58th Street North, Tarrant, Alabama on December 4, 1993. (Exhibit 1).
- b. Alabama Uniform Incident/Offense Report pertaining to fire at Jefferson residence and investigation into Ms. Jefferson's death. (Exhibit 2).
- c. Notice of claim for damages for death of Alberta K. Jefferson filed by Melvin Jefferson as personal representative of her estate. (Exhibit 3).
- d. Notice of Claim for damages filed by Melvin Jefferson in his individual capacity. (Exhibit 4).
- e. Notice of Claim for damages filed by Ben Jefferson in his individual capacity. (Exhibit 5).
- f. Notice of Claim for damages filed by Leon Jefferson in his individual capacity. (Exhibit 6).

/s/ Stephen Wayne Hall
Stephen Wayne Hall

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, the undersigned, a Notary Public in and for said County and State, did personally appear Stephen Wayne Hall, who being first duly sworn, deposes and says that he/she has read the foregoing, that the contents contained herein are true and correct and that he/she executes the same voluntarily and of his/her own free will.

6-23-95
DATE

/s/ Allen Wlepin Jr.
NOTARY PUBLIC
My Commission Expire: 9-10-95

ALARM RECEIVED BY: Phone () Radio () 3. Am () 4. Amel ()
LOCATION OF FIRE: 6017 58 St No. Room or Apt. Floor
OCCUPANT'S NAME: Alberta Jefferson Address
INSURANCE COMPANY:
RESPONDING EQUIPMENT: P. 33-1111
II. TYPE OF NON-FIRE: 1. Water Flow-No Service () 3. False Alarm-Mistaken Citizen ()
2. False Alarm-Palicious () 4. Fire-No Service ()
III. TYPE OF FIRE: () 1. Fire in Structure () 2. Fire not in Structure () 3. Fire in
Mobile Unit
IV. NON-OCCUPANT CODE: (Circle appropriate no.)
01 Motor Vehicle 07 Fence 13 Rubbish
02 Truck w/Inflammable Material 08 Fire Works 14 Portable Vessel w/ Flamm.
03 Tank Truck 09 Grass or Brush 15 Railroad Rolling Stock
04 Aircraft Fire 10 Lumber (not lumber yard) 16 Roofing Kettle
05 Boat 11 Barn or shed 17 Tar Pot
06 Bridge 12 Garbage 18 Unclassified
V. PLACE OF OCCUPANCY: (New Occupied) Dwelling
VI. FIRE FACTORS:
() A. Building Construction () B. Building Height () C. Building Area
1. Fire Resistant ① One Story ① Under 3,000 Sq. Ft.
2. Heavy Timbers 2-3 Stories 2. 3,000 - 5,000 Sq. Ft.
3. Non-Combustible 3-5 Stories 3. 5,000 - 10,000 Sq. Ft.
4. Ordinary Jointed 4-10 Stories 4. Over 10,000 Sq. Ft.
5. Wood Frame
6. Combination
VII. PROXIMITY OF ADJACENT PROPERTY: () 1. Separated () 2. Adjacent () 3. Same as Fire
VIII. SOURCE OF FIRE: () 1. Confined to place of origin () 3. Extended to adjacent property
2. Confined to building () 4. Extended beyond adjacent property
IX. FIRE ESCAPES: (Circle all appropriate factors)
① Available and used by Residents 3. Used by Fire Department
② Available-not used 4. None Available
X. EXTERIOR EXTINGUISHING AIDS: (Circle all appropriate factors)
01 Automatic Sprinklers 05 Foam System 09 Hand Pump 13 Heavy Stream Appar.
02 CO2 System 06 Private Extinguisher 10 Nozzler
03 Deluge System 07 Stumppipes 11 1 1/2" Hose
04 Dry Chemical System 08 Hand Extinguisher 12 1 1/2" and/or 2" Hose
XI. INTERIOR EXTINGUISHING AIDS: (Circle all appropriate factors)
1. Controlled Fire 3. No Hoses Opened 5. 1-5 Hoses 7. 11-20 Hoses
2. Did not Control Fire 4. Hoses in Area Available 6. 6-10 Hoses 8. Over 20 Hoses
XII. DRAFT EXISTENCE: (Circle all appropriate factors)
10. CONSIDERABLE 1. None 2. Small 3. Moderate ② Considerable
11. MODERATE 1. None 2. Small 3. Moderate ② Considerable
XIII. WEATHER CONDITIONS: (Circle all appropriate factors)
1. Clear ② Rain 3. Ice & Snow 4. Wind & Factor 5. Temp. above 65 degrees
6. Snow 7. Rain 8. Wind
XIV. FIRE - FIRE - FIRE: (Circle all appropriate factors)
Number of Persons Injured Number of Persons Killed
Persons Injured () Firefighters () Civilians () Firefighters ()
Civilians () Firefighters ()
XV. SALVAGE & POLICE CALL: (Check one)
Salvage called () Police called (✓)

2. **THE COMPANY INDEX**

Bryant 14 B

Signed: _____
Fire Chief

Persons Reporting Fires: 1,169,225

Witnesses to fire before arrival of Fire Department: Owner - son - and
neighbor

• Detailed description of situation on arrival: Rear half of house
fully engulfed in flames

- Detailed description of action taken by Fire Department: Put down supply line from Hydrant at 59th & Wilson. Extinguished fire with $1\frac{1}{2}$ " lines.

1. *Causes of Death*

5. Off duty personnel called: Yes

2. National AIDS Unit's responsibilities

2. Detailed description of mine locations

ALABAMA UNIFORM INCIDENT/OFFENSE REPORT

PORT
INS. CITY OF
TAUANT

10800012061994	TARRANT 743 L 71908	93 12 1865
607 S 5th St No. TARRANT AL	607 S 5th St No. TARRANT AL	CCD
Jefferson ALABAMA	Korean	
46 125 017 217 66		
Death Investigation		
#13		
72 04 913 2145		
72 04 913 2145		
RECEIVED		
MAY 2 5 1994		
KEY TO INDEX		

ALABAMA UNIFORM INCIDENT/OFFENSE REPORT SUPPLEMENT

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

01108100	TARRANT	11/04/93	123-00	93-1218-65
Tarrant, Alabama		Death Investigation		
<p>that it appeared smoke was coming from the ceiling and was near toward the base of the tree where there is a whooping sound. Gerald advised that he went to his grandfather's bedroom door. However, it was shut and he could not open it. Wif #2 Marcella Pitts took them to get out. The Complainant, Wif #1 + Wif #2 then ran out the rear door and down to the victim's bedroom window.</p> <p>Complainant states that his grandfather was outside the REGENCY and was reaching back in the window trying to get the victim out. Wif #2 then ran to the door and was able to get the victim out through the window. However, she was already dead.</p> <p>EVIDENCE Tech Brenda W. Kingstun and Coroner Jay Glass were called to the scene. No other injuries</p>				
<p>TYPE OR PRINT IN BLACK INK ONLY</p> <p>AGAC-92 REV. 3-92</p> <p>Steve Barker II JAT 11</p>				

1200 Grand Boulevard
Birmingham, AL 35214

January 18, 1944

The City of Tarrant
Clerk of the City of Tarrant
Tarrant, Alabama 352

RE: The Estate of Alberta R. Jefferson
Wrongful Death occurring on December 4, 1993

Dear Clerk of City:

Please be advised this letter is to put you on notice that as Executor of the Estate of Alberta R. Jefferson I am claiming personal injury, mental anguish, conduct so outrageous that it surpassed the normal, negligence, wantonness and recklessness in the death of Alberta R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I hereby made demand for damages on behalf of the Estate in the cause of her wrongful death caused by the Fire Department of Tarrant.

Sincerely,

/s/ Melvin C. Jefferson
Melvin Jefferson
Executor of the Estate of
Alberta R. Jefferson

Sworn to and subscribed before me this 18th day of January, 1994.

/s/ Linda B. Laiser
Notary Public

My commission expires 02 Dec 95.

cc: The City of Tarrant Fire Department

February 10, 1994

The City of Tarrant
Clerk of the City of Tarrant
1604 Pinson Valley Parkway
Tarrant, Alabama 35217

Re: Alberta R. Jefferson's
Wrongful Death occurring on December 4, 1993

Dear Clerk of Court:

Please be advised this letter is to put you on notice that as the son of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Albert R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my mother out of the house, which they refused to give. I hereby made demand for damages in the cause of her wrongful death caused by the Fire Department of Tarrant.

Sincerely

/s/ Melvin C. Jefferson
Melvin Jefferson

February 10, 1994

The City of Tarrant
Clerk of the City of Tarrant
1604 Pinson Valley Parkway
Tarrant, Alabama 35217

Re: Alberta R. Jefferson's
Wrongful Death occurring on December 4, 1993

Dear Clerk of Court:

Please be advised this letter is to put you on notice that as the husband of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Albert R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my wife out of the house, which they refused to give. I hereby made demand for damages in the cause of her wrongful death caused by the Fire Department of Tarrant.

Sincerely,

/s/ Ben Jefferson
Ben Jefferson

Sworn to and subscribed before me this 11 day of February, 1994.

/s/ Robert D. Sklon
Notary Public

My commission expires on 3/18/95.

February 10, 1994

The City of Tarrant
Clerk of the City of Tarrant
1604 Pinson Valley Parkway
Tarrant, Alabama 35217

Re: Alberta R. Jefferson's
Wrongful Death occurring on December 4, 1993

Dear Clerk of Court:

Please be advised this letter is to put you on notice that as the son of Alberta R. Jefferson, I am claiming personal injury, mental anguish, conduct so outrageous that it surpasses the normal, negligence, wantonness and recklessness in the death of Albert R. Jefferson, which was caused by the Fire Department of Tarrant when they responded to a fire at her home on December 4, 1993. I witnessed the actions of the Fire Department of Tarrant and begged for their assistance in bringing my mother out of the house, which they refused to give. I hereby made demand for damages in the cause of her wrongful death caused by the Fire Department of Tarrant.

Sincerely,

/s/ Leon Jefferson
Leon Jefferson

Sworn to and subscribed before me this 11 day of February, 1994.

/s/ Robert D. Sklon
Notary Public

My commission expires on 3/18/95.

did you call him?

A. He called.

Q. Are you aware of any problems that Mr. Webb ever had at the Fire Department?

A. No.

Q. To start with, I'm talking about the Jefferson fire now, December 4th, 1993. Can you tell me — we're going to start talking about what happened that day. Can you tell me when you first became aware of the fire?

A. It was by telephone, and would have to look at the fire report to get the time.

Q. Would that be in some of these papers that you brought?

A. Yes.

Q. Why don't you pull out whatever you need. Wait a minute. Let's do this. I'm going to mark this whole thing as Plaintiff's Two.

* * *

able to say that it was 9:45 p.m.?

A. The police dispatcher record. The police dispatches us also.

Q. But how were you able to come up with that 21:45?

A. It's recorded.

Q. Where is it recorded?

A. In the police department.

Q. Is it on here, on what I've got marked as 2(a) somewhere?

A. Yes.

Q. Do you remember you hearing about the fire at 9:45, or is that just — you just know that the call came in at 9:45 because of that piece of paper?

A. Yes.

Q. When did you first hear about the fire?

A. At 9:45.

Q. So you took the call?

MR. MORSE: Why don't y'all straighten it out?

I think what he's asking you is, do you have an independent recollection. A recollection independent of the fire report.

THE WITNESS: Well, I'm sure heard the phone ring, but I'm not —

MR. MORSE: Is that what you're asking, Brian?

MR. CLARK: No. I think we've established from this document that the call came in at 9:45.

MR. MORSE: Right.

MR. CLARK: I want to know when he first heard about the fire.

A. Well, the phone rings in the fire department. And when our phone rings, if we're there, we answer it. Anyone answers it.

Q. Did you —

A. If we're not there, the police dispatcher answers it.

Q. Who answered it in this instance?

A. I cannot remember.

Q. When you say that the call came in at 9:45, what do you mean? Does that mean that your phone rang at 9:45 at the Fire Department?

A. Yes.

Q. Do you know if anybody picked that up?

A. No, I don't remember.

Q. Do you know if it went to the police dispatcher?

A. The police dispatcher can also pick up, yes.

Q. Do you know if the police dispatcher had to pick it up, or if someone from the fire department picked it up?

A. I do not remember.

Q. Okay.

A. But it can be both at times.

Q. What would happen if nobody picked up in the fire department?

A. The police dispatcher would pick it up.

Q. How long would it take the police dispatcher to pick up?

A. One or two rings.

Q. And, then, what would happen?

A. They're aware when we're not at the station.

Q. And, then, what would happen?

A. Then, she could get on the radio and dispatch us that way.

Q. She would get on the radio and call the fire department and say there's a fire —

A. Yes.

Q. — at thus and so address?

A. Yes.

Q. Do you know which procedure happened in this case?

A. We were at the station.

Q. So somebody from the —

A. Somebody from the fire department picked it up.

Q. Do you know who that was?

A. No, I do not.

Q. Well, how did you first find out that you were going to a fire that evening?

A. Whoever answered the phone said so.

Q. Do they just put down the phone and say, "Hey, we're going to a fire?"

A. Yes.

Q. Did they tell you anything about the fire?

A. No.

Q. Do you remember who told you, "We're going to a fire?"

A. No.

Q. Do you know how long it was from the time the phone rang until you knew you were going?

A. Immediately.

Q. Do you know that, or is that just the general practice and procedure?

A. Both. When the fire phone rings, everybody heads for it.

Q. There's a separate phone for the fire phone?

A. Yes, there are two fire lines. And, then, we also have "hello" phones.

Q. Right.

A. Non-emergency.

Q. If I want to call and want to talk to you, or if somebody's wife wants to call and tell their husband to pick up a loaf of bread, it's not going to be on the fire phone?

A. It should not be.

Q. Should not be?

A. Right.

Q. So there's a fire phone where you know that if that phone rings, we're going?

A. It's an emergency.

Q. It's an emergency?

A. Or possibly.

Q. Possibly an emergency?

A. It could be something like a wrong number.

Q. A wrong number or something like that?

A. Yes.

Q. So the fire phone rang, and how did you know — did you hear the fire phone ring that night?

A. Yes.

Q. When did you first know where you were going?

A. Usually, whoever answers the phone will tell everybody the address as we're going to the truck.

Q. Is that what happened that night?

A. Yes.

Q. So you were in the fire station when somebody told you, "We're going to 6017 58th Street North?"

A. Yes.

Q. Did you know where that was?

A. Yes.

Q. Were you driving a truck? How many trucks responded?

A. Two.

Q. I'm not a firefighter, but are they different? Could you describe how they're different, or are they the same?

A. The engine is a pumper that carries the water and puts out the fire. And I was in the rescue truck.

Q. That is the one —

A. It has the first aid equipment and the rescue equipment.

Q. What kind of neighborhood is that address?

MR. MORSE: Object to the form. It's ambiguous. What kind of neighborhood is that.

MR. MORSE: Well, you know what it is.

MR. MORSE: No, I don't understand that question.

MR. CLARK: He said he knows where it is. And I want to know how he knows where it is.

MR. MORSE: I object to the form.

MR. CLARK: Well, he can answer it.

A. It's Airport Hills. It's a neighborhood near the airport. It was annexed into Tarrant at some time.

Q. Is there anything different about that neighborhood than any other neighborhood in Tarrant?

A. Not in particular.

Q. Are there more Black persons that live in that section of town than any other section of town?

MR. MORSE: I, again, object to the form. If you know the answer to that question, go ahead, if you know the answer.

A. Yes.

Q. How do you know that?

A. Experience.

Q. You said "experience." What sort of experience?

A. Well, just you get to know your territory. You know where the plugs are.

Q. How do you know the people that live in the houses?

A. We don't.

Q. Well, how do you know that that's a neighborhood where more Black folks live?

A. The previous runs that we made in that area and from riding around studying territory.

Q. Do you see the people around the houses?

A. Yes.

Q. And you obviously can see the color of the skin of the folks in the houses?

A. Yes.

Q. How long was it from the time that you found out that you were going to a fire until the time that you got there?

A. How long in minutes?

Q. In minutes, or in hours, or in days, or weeks, or however long it

A. Four minutes.

Q. Four minutes. How do you know it's four minutes?

A. We tell the police dispatcher when we get on the scene. And it's logged.

Q. Do you have any independent recollection of how long it took you?

A. No.

Q. So you don't know if it was four minutes? You're just reading off of Plaintiff's 2(a)?

A. Yes.

Q. So the real answer to that

* * *

knowledge, from the time that she told you until the Fire Department got there it was twenty minutes?

A. I believe it was twenty minutes, because they didn't come right on.

Q. Okay. Now, are there any complaints that you have, any problems that you have with the Tarrant Fire Department other than what you have told me about? I know you told me the man putting the hose down.

A. No.

Q. Is there anything that makes you think that they didn't come out there that quickly just because you were black?

A. I can't tell you that either. I know one thing, they took their time coming out there. And I didn't have any help from either one of them to help me get my wife out.

Q. Do you have any information or any knowledge or any facts to show that they denied services to you or your family out you were black?

A. No, they didn't. That is all I can say. They didn't help me get my wife out, because I was standing here as close as from me to you when I asked him.

Q. There are other black families than you folks that live there in Tarrant, isn't there?

A. Yes.

Q. To your knowledge, have any of them had any problems of any type with the Tarrant Fire Department?

A. Not that I know of, because ain't nobody else's house got burned up as far as I know anything about.

Q. Have any of the others needed emergency services of any type where they might have called the Tarrant Fire Department?

A. Not that I know of.

Q. You don't know of anything that would indicate to you that fire protection was denied to you or any other black families out in Tarrant because y'all were black and not white?

A. I don't know.

Q. All right, sir. Now, while we have told me about this, have you told me about all of the conversations that you had with anybody from the Tarrant Fire Department?

A. I never had a conversation with them.

Q. Other than the one man?

A. Other than the one man. I asked him what I just told you.

Q. He is the only person you talked with? That is right.

A. That is right.

Q. Have you talked with any people from the Tarrant Fire

* * *

A. That information is that at the time my mother was taken from the house and placed on the ground, no CPR was administered.

Q. Do you know if she was, at that time when she was taken from the house and placed on the ground, do you know of your own knowledge as to whether she was living or dead at that time?

A. I do not.

Q. All right, sir. Now, do you have any information from any source that the City of Tarrant denied services or protections to any minority groups?

A. To the best of my knowledge as far as I can remember — to any minority groups?

Q. Yes, sir. Blacks, Hispanics, anyone other than, I guess, white male is a minority group now.

A. I don't. I don't. I know one other incident where a fire occurred in our neighborhood.

Q. What was that incident?

A. There was a fire at Ms. Pugh's house. It is on the next block, around the corner on the next block from my mother's house.

Q. Do you know how long ago it was that a fire occurred?

A. I can't remember.

Q. Just to get some kind of frame, five years, ten years, twenty?

A. I can't remember. Five. I can't remember.

Q. Ms. Pugh, would that be the mother of the gentleman you talked to out there about this?

A. The grandmother.

Q. What was there about that fire that led you to the conclusion that the Fire Department wasn't providing services to her?

A. The house was destroyed.

Q. Was there any indication that you got from her that the Fire Department was slow in getting there or did something improperly in putting the fire out?

A. I never talked to Ms. Pugh directly.

Q. Who did you talk to?

A. It is from what I heard.

Q. Who did you hear it from?

A. I heard it from talking with my brother.

Q. We talked about your brother. Is that your brother that is here in the room with us now, Leon Jefferson?

A. Yes.

Q. What did he tell you?

A. We had conversations about the fire at Ms. Pugh's house.

Q. All right. What did he tell you about it, specifics?

A. Her house was destroyed.

Q. All right. Did he tell you that the Fire Department was called and they did not come out there?

A. Her house was destroyed. I mean, it — they were slow in getting there, too. The Fire Department was slow in getting to Ms. Pugh's house, also.

Q. Were any criticisms of Fire Department given to you by brother or anyone else on the Pugh fire other than the fact they were slow in getting there?

A. Not that — other people saying it? Not that I can recall.

Q. Do you yourself have any other facts that indicate to you that the City of Tarrant Fire Department has been denying fire protection to you or anyone else in Tarrant because they are a minority group?

A. No, other than the incidents that I described that — these things that we talked about.

Q. The incident that occurred to your mother and the incident that occurred to Ms. Pugh?

A. As best that I can remember.

Q. All right. Do you have any other information yourself that the City of Tarrant in any way refused to provide services or deny services to any minority groups other than what you have told me about?

A. The best I can remember, no.

Q. Do you have any other criticisms, you, yourself, and as administrator of the estate, do you have any other criticisms of anything that the City of Tarrant did or didn't do other than what you have told me about?

MR. BRIAN CLARK: Object to the form.

A. Any other criticisms? When you say criticisms, what do you mean?

* * *

Q. Anybody else that you saw that you recognized out there?

A. Not at that time. Ms. Noland was there, but he she was standing in the front of her house. That wasn't anywhere back near where the fire was.

Q. Did you stay there until the coroner got there?

A. Yes.

Q. Did you stay there until they removed your mother's body?

A. That is correct.

Q. Were the Fire Department people still there at that time?

A. That is correct.

Q. Now at any time thereafter, other than talking with Captain Jones, have you talked with anybody that is associated with the City of Tarrant about this incident?

A. No, I didn't talk with anyone but Captain Jones.

Q. Now, have you talked with anybody or do you have any information that the City of Tarrant out there denied fire protection to people out there because they were minorities or blacks?

A. Well, Tarrant, from the Pugh incident that occurred maybe in '90 or '91. You have that in your interrogatory questions, Ms. Pugh, the year the fire started and everything. She stated the fact that they were somewhat slow about getting to house when her house caught

on fire. They were very slow. They were sluggish. And when they got there they are sluggish about doing their work, very slow, very sluggish. Said she could have put out the fire herself probably at the time they got out here, you know, and she would probably tell you the same.

Q. Any other incidents that you are aware of that anybody has told you about or that you personally know other than the Pugh incident?

A. No, nothing other than the Pugh incident. And from that pattern, the sluggishness, the slowness, from that pattern in that area, just blacks in that area, on 58th, 59th, 57th. There is no other area that blacks are in, on that pattern, they are slow and sluggish and did not do a sufficient job.

Q. You think they are slow and sluggish because of the problem Ms. Pugh had at her house and because you think it took them a long time to get to your parents's house?

A. From that pattern, that, and then from the same pattern that occurred some four or five years later after Ms. Pugh's incident. They was not very slow and very sluggish, not efficient. They didn't perform a distinguish job.

Q. All right. You talked about an incident four or five years after Ms. Pugh. Is that what you are talking about?

A. Ms. Pugh and my parents. That is what I am talking about.

Q. All right. Any other incidents other than those two incidents of which you are aware?

A. No.

Q. Do you have any information that they, that the people out there just deny fire protection services to members of minority groups other than what you have told me about?

A. Other than nothing but what I told you about. That is all I know.

Q. All right. And any statements that you made that they just don't provide fire protection to blacks or minorities based on the problems that you had at your house or our mom and dad's house —

A. Right.

Q. — has anybody else told you of any problem they have had with the Tarrant Fire Department or the Tarrant Police Department of any type?

A. I just heard some years ago back they were slow when it come to black people, period. I just heard that maybe from some people in the area. I don't know of any names that I recall. From the Pugh pattern to the Jefferson pattern, I found that to be kind of true.

Q. Can you give me a judgment as to how long you were out there from the time you got out there, and got out of your car until the time that you were able to get your mom out of the house?

A. Give you a time from the time that I ran out of the car, Al and I ran around the side of the house, I can't nail it down, but it was immediately.

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
vs.) Civil Action No.
CITY OF TARRANT, ALABAMA;) CV 94-4523
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

MOTION TO DISMISS OR, IN THE ALTERNATIVE,
TO STRIKE "CITY OF TARRANT, ALABAMA FIRE
DEPARTMENT" AS PARTY DEFENDANT

The defendants, City of Tarrant, Alabama, a municipal corporation, and "City of Tarrant, Alabama Fire Department," move the Court to enter an Order dismissing or striking the "City of Tarrant, Alabama Fire Department" as a party defendant. As grounds, the defendants state the following:

1. As the plaintiffs acknowledge in their Complaint, the defendant, City of Tarrant, Alabama, is a municipal corporation organized under the laws of Alabama.
2. § 11-43-140, Ala. Code states in pertinent part: "Cities and towns may maintain and operate a volunteer or paid fire department.
3. There is no person or legal entity described as the "City of Tarrant, Alabama."

4. The City of Tarrant, Alabama maintains a fire department pursuant to § 11-43-140.

5. Tarrant's fire department is not a separate governmental entity or municipal corporation. Rather, the City of Tarrant, Alabama maintains and operates a fire department under § 11-43-140 as a municipal service.

6. It is self-evident that to be a party to a lawsuit, one must be a person, either natural or created by law. The Tarrant Fire Department is neither.

WHEREFORE, PREMISES CONSIDERED, the defendants move the Court to enter an Order dismissing or striking the "City of Tarrant, Alabama Fire Department."

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

Attorneys for CITY OF TARRANT,
ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

OF COUNSEL:

CLARK & SCOTT, P.C.

3500 Blue Lake Drive, Suite 350

Birmingham, AL 35243-1907

(205) 967-9675

NOTICE OF HEARING

This Motion to Dismiss or, in the Alternative, to Strike "City of Tarrant, Alabama Fire Department" as a Party Defendant is set before Judge Drayton N. James, Circuit Court Judge, Jefferson County, on July 17, 1995 at 8:15 a.m.

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered a copy of the foregoing Motion to Dismiss or, in the Alternative, to Strike "City of Tarrant, Alabama Fire Department" as a Party Defendant to the following attorney of record on June 30, 1995:

Dennis G. Pantazis, Esq.
1400 South Trust Tower
Birmingham, AL 35203

/s/ Wayne Morse
OF COUNSEL

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)	
and as the Administrator of the)	
Estate of ALBERTA K. JEFFERSON;)	
LEON JEFFERSON and BENJAMIN)	
JEFFERSON,)	
Plaintiffs,)	
vs.)	
CITY OF TARRANT, ALABAMA;)	Civil Action No.
CITY OF TARRANT, ALABAMA)	CV 94-4523
FIRE DEPARTMENT,)	
Defendants.)	

**MOTION TO LIMIT PLAINTIFFS' DEMAND FOR
JUDGMENT TO STATUTORY LIMIT**

The defendants, City of Tarrant, Alabama, and City of Tarrant, Alabama Fire Department, move the Court to enter an Order striking the Plaintiffs' demand for judgment and limiting the plaintiffs' demand for damages to One Hundred Thousand Dollars (\$100,000.00). In support of this Motion, the defendants offer the following:

1. The defendants are a governmental entity as that term is used in § 11-93-2 Ala. Code, which limits the recovery of damages against a governmental entity to \$100,000 for bodily injury or death.
2. This action seeks damages for death and outrage. Accordingly, § 11-93-2 applies.
3. The plaintiffs seek One Million Dollars (\$1,000,000.00) in each Count of the Complaint.

4. The plaintiffs contend the statutory cap is inapplicable because Counts IV and V seek damages under 42 U.S.C. § 1983 for infringement of the decedent's constitutional rights. *See Patrick v. City of Flora, 793 F.Supp. 301, 302 (M.D. Ala. 1992)* ("[S]tate statutes purporting to limit the damages available in a suit against a state action are not applicable to suits brought under § 1983.")

5. In Count IV, the plaintiffs allege that the decedent was denied her constitutional right to due process of law, because of her race, when the employees of the Tarrant Fire Department did not rescue and revive her. In Count V, the plaintiffs allege that the decedent was denied equal protection and that the Tarrant Fire Department engaged in a pattern and practice of discrimination toward minorities.

6. Counts IV and V, however, fail to state a cognizable claim for relief. The Due Process Clause of the Fourteenth Amendment to the United States Constitution "generally confers no affirmative right to governmental aid." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 195-96, 109 S.Ct. 998, 1003 (1989). Applying this constitutional principle in the context presented, courts have uniformly held that there is no constitutional right to be rescued by the government, and inept rescue is not a cognizable theory for due process liability under § 1983. *Culver-Union Township Ambulance Serv. v. Steindler*, 629 N.E. 2d 1231, 1234 (Ind. 1994); *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. den'd*, 465 U.S. 1049, 104 S.Ct. 1325 (1984).

7. Similarly, the plaintiffs have no equal protection claim. As other courts have declared, if the plaintiffs have a constitutional claim under the allegations presented, it is under the Due Process Clause, but no such claim exists here because there is no constitutional right to rescue services. *Steindler*, 629 N.E. 2d at 1234; *Jackson*, 715 F.2d

1200. Likewise, the plaintiffs have no equal protection claim because they are unable to prove an "intent to discriminate" on the part of Tarrant City. *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1406 (11th Cir. 1993).

8. Importantly, neither compensatory nor punitive damages are recoverable against a municipality in an action brought under § 1983 for violation of constitutional rights where the survival of the decedent's claim is governed by the Alabama wrongful death statute. *Carter v. City of Birmingham*, 444 So.2d 373 (Ala. 1983), *cert. den'd*, 467 U.S. 1211, 104 S.Ct. 2401 (1984). This action is governed by the Alabama wrongful death statute. *Id.* Therefore, neither compensatory nor punitive damages are recoverable, the plaintiffs do not state a cognizable claim under § 1983, and the defendants are entitled to dismissal of Counts IV and V. *Id.*

WHEREFORE, PREMISES CONSIDERED, the defendants move the Court to enter an Order as follows:

- (a) striking the plaintiffs' demands for judgment;
- (b) limiting the plaintiffs' demand for judgment to an amount not to exceed One Hundred Thousand Dollars (\$100,000.00);
- (c) directing the plaintiffs or their counsel or their witnesses or their other witnesses not to testify, mention or imply that the plaintiffs are entitled to a recovery in excess of the statutory limit of One Hundred Thousand Dollars (\$100,000.00).

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

Attorneys for CITY OF TARRANT,
ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

OF COUNSEL:

CLARK & SCOTT, P.C.
3500 Blue Lake Drive, Suite 350
Birmingham, AL 35243-1907
(205) 967-9675

NOTICE OF HEARING

This Motion for Summary Judgment is set before the Honorable Drayton N. James, Circuit Court Judge, Jefferson County, on July 17, 1995 at 8:15 a.m.

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered a copy of the foregoing Motion to Limit Plaintiffs' Demand for Judgment to Statutory Limit to the following attorney(s) of record on June 30, 1995:

Dennis G. Pantazis, Esq.
1400 SouthTrust Tower
Birmingham, AL 35203

/s/ Wayne Morse
OF COUNSEL

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON.)
Plaintiffs,)
vs.) Civil Action No.
CITY OF TARRANT, ALABAMA;) CV 94-4523
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

MOTION FOR JUDGMENT ON THE PLEADINGS

The defendants, City of Tarrant, Alabama, and City of Tarrant, Alabama Fire Department, move the Court to enter an Order granting judgment on the pleadings in favor of the defendants as to Counts IV and V of the Complaint. Pursuant to Rule 12(c), Ala.R.Civ.P., the defendants are entitled to a judgment as a matter of law and dismissal of Counts IV and V based solely on the pleadings. Alternatively, the defendants request the Court to consider this Motion as one for summary judgment and consider this Motion as part of the Defendants' Motion for Summary Judgment filed on June 26, 1995 and scheduled for a hearing on July 17, 1995. In support of this Motion, the defendants state the following:

1. Counts IV and V of the Complaint seek compensatory and punitive damages against the defendants, a municipality, under 24 U.S.C. § 1983, for violation of due

process and equal rights under the Fourteenth Amendment to the United States Constitution. Specifically, plaintiff Melvin Jefferson, as personal representative of the estate of Alberta K. Jefferson, alleges that Ms. Jefferson's death was caused by the defendants' unconstitutional actions. The remaining Counts seek recovery based on Alabama tort law claims.

2. According to the Alabama Supreme Court and the U.S. District Court for the Northern District of Alabama, survival of a decedent's claim for compensatory damages under § 1983 against a municipality is governed by the Alabama wrongful death statute, not federal law; thus, a claim for compensatory damages against a municipality does not survive. *Carter v. City of Birmingham*, 444 So.2d 373 (Ala. 1983), *cert den'd*, 467 U.S. 1211, 104 S.Ct. 2401 (1984); *Brown v. Morgan County*, 518 F.Supp. 661 N.D. Ala. 1981).

3. "Compensatory damages are not available to a plaintiff maintaining a § 1983 case in reliance on the Alabama wrongful death act . . ." *Carter*, 444 So.2d at 377 (quoting *Brown*, 518 F.Supp. at 665).

4. Municipalities are immune from punitive damages under § 1983, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 101 S.Ct. 2748 (1981); *Carter*, 444 So.2d at 373.

5. The claims of the plaintiff Melvin Jefferson brought in Counts IV and V of the Complaint under § 1983 are brought "in reliance on the Alabama wrongful death statute." *Carter*, 444 So.2d at 373.

6. Accordingly, because Ms. Jefferson's claim for compensatory damages under § 1983 did not survive, and because Ms. Jefferson's personal representative is not entitled to recover either compensatory or punitive damages, the defendants are entitled to a judgment as a matter of law. *Carter*, 444 So.2d at 373 (holding that City of Birmingham was entitled to a summary judgment in a

§ 1983 action because decedent's claim for compensatory damages did not survive and punitive damages are not recoverable against a municipality).

WHEREFORE, PREMISES CONSIDERED, the defendants respectfully request the Court to enter a judgment in their favor as to Counts IV and V of the Complaint, brought under § 1983, for the reasons stated.

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

Attorneys for CITY OF TARRANT,
ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

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3500 Blue Lake Drive, Suite 350
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(205) 967-9675

NOTICE OF HEARING

This Motion for Judgment on the Pleadings is set before the Honorable Drayton N. James, Circuit Court Judge, Jefferson County, on July 17, 1995 at 8:15 a.m.

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered a copy of the foregoing Motion for Judgment on the Pleadings to the following attorney of record on June 30, 1995:

Dennis G. Pantazis, Esq. 1
400 SouthTrust Tower
Birmingham, AL 35203

/s/ Wayne Morse

OF COUNSEL

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, et al.,)
)
Plaintiffs,)
)
V.) CIVIL ACTION NO.
) CV 94-4523
CITY OF TARRANT, ALABAMA, et al.,) (JUDGE JAMES)
)
Defendants.)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION TO LIMIT PLAINTIFFS' DEMAND FOR JUDGMENT TO STATUTORY LIMIT

COME NOW the plaintiffs in the above-referenced case, by and through their undersigned counsel, and submit this opposition to the Motion for Judgment on the Pleadings filed by defendants City of Tarrant, Alabama and City of Tarrant, Alabama Fire Department.

I. PREFATORY STATEMENT

A thorough recitation of the facts is contained in Plaintiffs' Opposition to Motion for Summary Judgment filed herewith, and does not bear repeating here. However, some procedural background is necessary. This case arises out of a residential fire leading to the death of Alberta K. Jefferson on December 4, 1993. Plaintiffs' Complaint contains state causes of action, and claims in Court IV and V brought pursuant to 42 U.S.C. §1983 for the denial of due process and equal protection. On June 30, 1995, Defendants filed a motion seeking dismissal of

Plaintiffs' 42 U.S.C. §1983 claims, and a Motion to Limit Plaintiffs' Demand for Judgment to Statutory Limit.

II. ARGUMENT

A. State Law Claims Do Not Replace Section 1983 Remedies.

While state courts may entertain actions brought under the 42 U.S.C. §1983, *Ferrell v. City of Bessemer*, 406 So. 2d 337 (Ala. 1980), Section 1983 affords a federal cause of action for citizens deprived of the rights, privilege and immunities guaranteed by the Fourteenth Amendment by state agencies. *Monroe v. Pape*, 81 S.Ct. 473, 480 (1961). While the same facts may give rise to state law causes of action, those state law claims do not displace the parallel federal claim. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe*, 81 S.Ct. at 482.

B. The Construction Of The Alabama Wrongful Death Action And Section 1983 Claim In *Carter v. City of Birmingham* Is Inconsistent With Federal Law, And Is Not To Be Applied In This Case.

1. Carter Fails To Consider The Supremacy Of The Federal Remedy.

Defendants rely on the case of *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983) in their attempt to eliminate Plaintiffs' equal protection claims. Section 1983 has no survivorship provision, however, 42 U.S.C. §1988 provides that in cases where the federal civil rights laws are deficient, the relevant state law will apply. As such, in Alabama the state wrongful death statute, Ala. Code §6-5-410 (1975) will apply.

Defendants, citing *Carter*, argue that because the Alabama wrongful death act provides only for punitive damages, and because the United States Supreme Court in *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981), held that municipalities are immune from punitive damages under §1983, a §1983 claim cannot be against a municipality where the party denied equal protection of the law dies as a result of said denial. This argument, however, ignores the overwhelming weight of federal authority to the contrary that is binding on this Court when it decides federal claims.

This very issue was decided in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). In that case, the *Carter* analysis was specifically rejected. The law is clear that, "Under §1988, courts may decline to apply state law if it is inconsistent with the Constitution and laws of the United States." *Weeks*, 649 F. Supp. at 1304.

It is clear that the *Carter* construction of the Alabama wrongful death statute is inconsistent with §1983. The U. S. Supreme Court in *Robertson v. Wegmann*, 98 S.Ct. 1991 (1978) set out the test for determining whether a state statute is inconsistent with 42 U.S.C. §1983:

Correct analysis requires a determination of whether the application of a state statute in a particular case has the result not merely of causing the plaintiff's claim to fail, but also of undermining the policies of compensation and deterrence underlying §1983.

Id., at 1305. Those policies underlying §1983 include "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson*, 98 S.Ct. at 1995.

The *Weeks* court succinctly stated why the *Carter* application of the Alabama wrongful death statute is inconsistent with federal law:

A strict application of the Alabama wrongful death statute in cases involving municipal or county liability cannot be justified under the Robertson Court's analysis. The Alabama statute provides for the recovery only of punitive damages, but municipalities and counties are immune from these damages in actions under §1983. Thus, the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages, at least in cases where the decedent's death resulted from their wrongful acts. Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under §1983 for acts that cause deprivations of constitutional rights as long as the victims die. The policy of deterrence of official misconduct that underlines §1983 would obviously be severely undermined if the Alabama wrongful death statute is applied in a way that eliminates municipal and county liability in such cases. n8 Moreover, §1983's policy of compensating the victims of official misconduct would also be undermined.

Weeks, 649 F. Supp. at 1305.

Mindful of the goal of compensation and deterrence in a §1983 claim, the *Weeks* Court held that compensatory damages are allowable against an Alabama municipality on a §1983 claim.

This Court therefore holds that, in actions under §1983, where the liability of a municipality, county, or other local governmental entity is at issue, and where the alleged unconstitutional acts result in the death of the victim, the Alabama wrongful death act should be applied only to the extent that the decedent's action is permitted to survive. The wrongful death statute

should not be held to foreclose the recovery of compensatory damages against the governmental entity in question, for such a result would be inconsistent with the policies underlying §1983.

Id.

2. Courts Have Consistently Held That State Laws Damage Restrictions Such As Alabama's Wrongful Death Act Are To Be Disregarded When They Conflict With §1983 Policy.

The *Weeks* decision is well accepted as the majority position. *See, McFadden v. Sanchez*, 710 F.2d 907 (2d Cir.) (refusing to apply New York survival statute's limitation on the recovery of punitive damages for death of decedent), cert. denied, 464 U.S. 961, 104 S. Ct. 394, 78 L.Ed. 2d 337 (1983); *Heath v. City of Hialeah*, 560 F. Supp. 840 (S.D. Fla. 1983) (refusing to apply Florida statute's ban on the recovery of decedent's damages); *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982) (refusing to apply restrictions on recoverable damages in Colorado statutes); *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345 (E.D. Va. 1981) (refusing to apply the Virginia wrongful death statute's bar on recovery of decedent's damages or punitive damages).

The *Carter* Court applied the Alabama Wrongful Death Act to the plaintiffs' §1983 claim only through §1988. The standard, however, is that "to whatever extent §1988 makes state law applicable to Section 1983 actions, it does *not* require deference to a survival statute that would bar or limit the remedies available under Section 1983 for unconstitutional conduct that causes death." *McFadden, supra* at 911.

3. The Federal Law Articulated in McFadden And Weeks Is Binding On Alabama Courts.

A Section 1983 claim is a federal claim based on a federal statute. When that is the case, the law is clear that the Alabama courts are bound by federal precedent.

We are here concerned with a federal statute. Decisions of appellate federal courts, construing federal statutes, in the absence of a contrary holding by the Supreme Court of the United States, are binding on us. *Dickey v. West Boylston Mfg. Co.*, 251 Ala. 19, 36 So. 2d 106. And of course we are controlled by decisions of the United States Supreme Court in respect to its interpretation of federal statutes. *Atlantic Coast Line Ry. Co. v. Mangum*, 250 Ala. 431, 34 So. 2d 848.

Central of Georgia Ry. Co. v. Ramsey, 275 Ala. 7, 151 So. 2d 725 (Ala. 1962); *Oualls v. Citizens Bank*, 532 So. 2d 1039, 1040 (Ala. Civ. App. 1988) (When a decision by a federal appellate court is issued on a federal question, that decision is ordinarily binding on Alabama state courts).

The only Circuit Court directly addressing the issue, *McFadden*, has spoken loud and clear on this federal question, holding that "we have no doubt that limitations in a state survival statute have no application to a §1983 suit brought to redress a denial of rights that caused the decedent's death." *McFadden*, 710 F.2d at 911. As such, no deference is to be given the Alabama wrongful death act where it would deprive a federal cause of action.

The *Weeks* and *McFadden* decisions are the prevailing position. Moreover, contrary to Defendants assertion, *Brown v. Morgan County*, 518 F. Supp. 661 (Ala. 1981) does not support the *Carter* construction. *Brown* specifically states that it does not decide the issue

The court notes that, in instances where a wrongful death action is brought against a municipality under 1983 in Alabama, the result reached in this case, coupled with the recent Supreme Court opinion in *City of Newport v. Fact Concerts, Inc.*, ___ U.S ___, 101 S.Ct. 2748, 69 L.Ed.2d 619 (1981), which held that municipalities are immune from punitive damages in civil rights suits under 1983, bars recovery against municipalities for wrongful deaths caused by them in Alabama . . . The act was amended to . . . Absent amendment, the court expresses no-opinion on how the inconsistency would be remedied in Alabama death cases under 1983.

Brown, 518 F. Supp. at 664, n.3. The Northern District of Alabama has not passed on this issue. Because the federal appellate court's decision is binding precedent on this federal question, Defendants' reliance on *Carter* is not well-founded.

C. Because Plaintiffs Have A Proper Claim Under 42 U.S.C. §1983, The \$100,000.00 Statutory Damages Cap Is Not Applicable.

The Court in *Patrick v. City of Flora*, 793 F. Supp. 301 (M.D. Ala. 1992), clearly sets out the standard that the \$100,000.00 damages cap is inapplicable to a §1983 claim. In *Patrick*, the defendants moved to strike any claims for damages in excess of \$100,000.00 against a municipality where the complaint charged the defendants with violations of 42 U.S.C. §1983. In that case, the Court held that Alabama statutory cap of \$100,00.00 on damages recoverable against municipalities, Ala. Code §11-93-2 (1975) did not apply to federal §1983 claims. The *Patrick* Court, citing *Gamble v. Florida Department of Health & Rehabilitation Services*, 779 F.2d 1509, 1518 (11th

Cir. 1986) held that the availability of damage under §1983 is a question of federal law, not state law, and the application of an arbitrary \$100,000.00 limit to awards against municipalities frustrates the goals of the Federal Act. Similarly, the plaintiffs federal claims are in no way limited by the Alabama statute in the present case.

WHEREFORE, PREMISES CONSIDERED, Defendants' Motions for Judgment on the Pleadings and Motion to Limit Plaintiffs' Demand for Judgment to Statutory Limit are therefore due to be denied.

RESPECTFULLY SUBMITTED,

/s/ Brian M. Clark

Brian M. Clark and
Dennis G. Pantazis
Attorneys for Plaintiffs

OF COUNSEL:

GORDON, SILBERMAN, WIGGINS & CHILDS, P. C.
1400 SouthTrust Tower
Birmingham, Alabama 35203
Telephone: (205) 328-0640

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Plaintiffs' Opposition to Motion for Summary Judgment upon the counsel for the defendants, by hand-delivering a copy of same on this the 14th day of July, 1995.

John W. Clark, Jr., Esq.
Wayne Morse, Esq.
CLARK & SCOTT, P. C. 3500
Blue Lake Drive
Suite 350
Birmingham, Alabama 35243-1907

/s/ Brian M. Clark
Brian M. Clark

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
vs.) Civil Action No.
CITY OF TARRANT, ALABAMA;) CV 94-4523
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

**DEFENDANTS' MOTION TO STRIKE PLAINTIFFS'
OPPOSITION TO SUMMARY JUDGMENT AND
JUDGMENT ON THE PLEADINGS**

The Defendants, City of Tarrant, Alabama and City of Tarrant Fire Department, move the court to strike the Plaintiffs' Opposition to Defendants' Motion for Summary Judgment and Motion for Judgment on the Pleadings consisting of the Affidavits of Ida Bell Pugh and Demetrius Webb, plus citation of legal authority and argument. In support of this Motion, the Defendants state the following.

The Affidavits and deposition testimony offered by the Plaintiff are not admissible evidence and therefore should not be considered.

1. "Evidence that is not admissible at trial can not be considered on a motion for summary judgment." *Yar-*

brough v. Springhill Memorial Hosp., 545 So.2d 32, 34 (Ala. 1989). Speculation and conclusory allegations are insufficient to create genuine issues of material fact. *Tinsley v. Harrison*, 613 So.2d 1268 (Ala. 1993).

2. The Affidavits of Mr. Webb and Mr. Pugh do not set forth specific facts admissible as evidence as required by Rule 56 and Alabama case law; rather, the Affidavits consist of irrelevant and prejudicial information, inadmissible hearsay, speculation, conjecture and conclusory allegations.

3. This is an action seeking damages based on allegations of wrongful death, outrage and civil rights.

4. Nonetheless, the Affidavit of Mr. Webb, an African-American formerly employed as a Tarrant firefighter, states: his "bed intentionally soiled" while he worked at Tarrant; the Tarrant firefighters knew which sections of Tarrant were "predominantly white" and which sections were "predominantly black"; and Tarrant personnel reacted "more slowly to fires they knew were in black neighborhoods as opposed to fires in white neighborhoods."

5. Mr. Webb's Affidavit does not contain any information relevant to the issue in this lawsuit, does not set forth specific facts, and contains prejudicial remarks, speculation and conclusory allegations. Mr. Webb's Affidavit is not admissible evidence.

6. Ms. Pugh's Affidavit states that when she experienced a residential fire the Tarrant Fire Department arrived in ten minutes and "they made no attempt to put out the fire quickly."

7. Likewise, Ms. Pugh's Affidavit is due to be stricken because it is conclusory, speculative and fails to set forth specific facts admissible as evidence.

8. Additionally, The Plaintiffs' Opposition contains not a single page of deposition testimony. Rather, the Plaintiffs' Brief contains argumentative assertions, as well

as self-serving characterizations and excerpts, which seek legitimization by reference to a deposition page not included in the Opposition or as an exhibit. Self-serving and argumentative assertions of deposition testimony should not be considered as evidence.

The Plaintiffs' Opposition was not timely served.

9. On June 24, 1995, the Defendants served their Motion for Summary Judgment on the Plaintiffs.

10. Originally set for a hearing on July 7, 1995, the Defendants' Motion was continued to July 17 at 8:15 a.m. at the Plaintiffs' request. Plaintiffs represented to the Court that this continuance would give the Plaintiffs sufficient time to prepare an opposition to summary judgment and have it served in a timely manner.

11. Rule 56(c)(2) provides that "any statement or affidavit in opposition shall be served at least two (2) days prior to hearing."

12. Notwithstanding the Plaintiffs' representations and the requirements of Rule 6(c)(2), the Plaintiffs served their Opposition one day before the hearing.

13. The Plaintiffs' Opposition was served by hand delivery at 3:30 p.m. on July 14, 1995.

14. In computing time prescribed by the Alabama Rules of Civil Procedure, Rule 6(a) states that "the day of the act, event, or default from which the designated period of time begins to run shall not be included." In addition, Rule 56(a) provides: "When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

15. The Plaintiffs served their Opposition on a Friday (July 14 at 3:30 p.m.). Because the hearing is scheduled for a Monday, Rule 56(c)(2) precludes the counting of Saturday and Sunday. Thus, the Opposition was served one day before the hearing and is due to be stricken.

16. Affidavits opposing summary judgment not served in the time allowed by Rule 56(c)(2) are due to be stricken. *Speer v. Pin Palace Bowling Alley*, 599 So.2d 1140 (Ala. 1992); *Denson v. Blake*, 642 So.2d 975 (Ala. Civ. App. 1993) (holding that affidavits in opposition in summary judgment served on day of hearing may not be considered in court's discretion).

WHEREFORE, PREMISES CONSIDERED, the Affidavits offered by the Plaintiffs, as well as their self-serving and argumentative characterizations of deposition testimony, is due to be stricken.

/s/ Wayne Morse

John W. Clark, Jr.

Wayne Morse

Attorneys for the CITY OF TARRANT,
ALABAMA and CITY OF TARRANT,
ALABAMA FIRE DEPARTMENT

CLARK & SCOTT, P.C.

3500 Blue Lake Drive, Suite 350

Birmingham, AL 35243-1907

(205) 967-9675

CERTIFICATE OF SERVICE

I hereby certify that I have faxed and mailed a copy of the foregoing Defendants' Motion to Strike Plaintiffs' Opposition to Summary Judgment and Judgment on the Pleadings to the following attorney(s) of record on July 16, 1995:

Dennis G. Pantazis, Esq.
1400 South Trust Tower
Birmingham, Alabama 35203

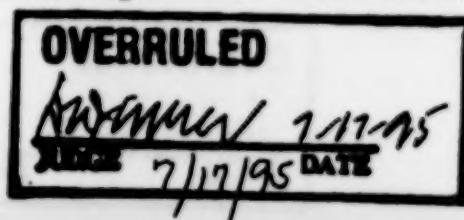
/s/ Wayne Morse
OF COUNSEL

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
vs.) Civil Action No.
CITY OF TARRANT, ALABAMA;) CV 94-4523
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

The defendants, City of Tarrant, Alabama ("Tarrant City"), a municipal corporation, and City of Tarrant, Alabama Fire Department ("Tarrant Fire Department"), move the court to enter an Order granting a summary judgment in their favor and dismissing this action, pursuant to Rule 56, A.R.Civ.P. As grounds, Tarrant and the Tarrant Fire Department state that no genuine issue of material fact exists, and they are entitled to a judgment as a matter of law. In further support of this Motion, Tarrant and the Tarrant Fire Department offer the following: (a) Complaint; (b) Answer; (c) Alabama Certificate of Death for Alberta R. Jefferson; (d) the Affidavit of Kelly Bryant, Tarrant Fire Department; (e) Tarrant Fire Report for fire at Jefferson residence; (f) pages from



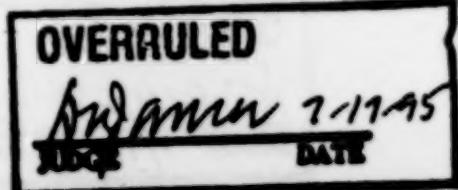
IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
vs.) Civil Action No.
CITY OF TARRANT, ALABAMA;) CV 94-4523
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

**MOTION TO LIMIT PLAINTIFFS' DEMAND FOR
JUDGMENT TO STATUTORY LIMIT**

The defendants, City of Tarrant, Alabama, and City of Tarrant, Alabama Fire Department, move the Court to enter an Order striking the plaintiffs' demand for judgment and limiting the plaintiffs' demand for damages to One Hundred Thousand Dollars (\$100,000.00). In support of this Motion, the defendants offer the following:

1. The defendants are a governmental entity as that term is used in § 11-93-2 Ala. Code, which limits the recovery of damages against a governmental entity to \$100,000 for bodily injury or death.
2. This action seeks damages for death and outrage. Accordingly, § 11-93-2 applies.
3. The plaintiffs seek One Million Dollars (\$1,000,000.00) in each Count of the Complaint.



IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
vs.) Civil Action No.
CITY OF TARRANT, ALABAMA;) CV 94-4523
CITY OF TARRANT, ALABAMA)
FIRE DEPARTMENT,)
Defendants.)

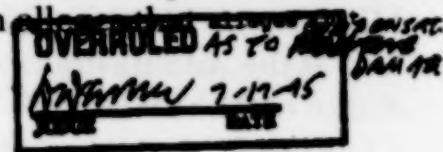
MOTION FOR JUDGMENT ON THE PLEADINGS

The defendants, City of Tarrant, Alabama, and City of Tarrant, Alabama Fire Department, move the Court to enter an Order granting judgment on the pleadings in favor of the defendants as to Counts IV and V of the Complaint. Pursuant to Rule 12(c), Ala.R.Civ.P., the defendants are entitled to a judgment as a matter of law and dismissal of Counts IV and V based solely on the pleadings. Alternatively, the defendants request the Court to consider this Motion as one for summary judgment and consider this Motion as part of the Defendants' Motion for summary Judgment filed on June 26, 1995 and scheduled for a hearing on July 17, 1995. In support of this Motion, the defendants state the following:

1. Counts IV and V of the Complaint seek compensatory and punitive damages against the defendants, a municipality, under 24 U.S.C. § 1983, for violation of due

process and equal rights under the Fourteenth Amendment to the United States Constitution. Specifically, plaintiff Melvin Jefferson, as personal representative of the estate of Alberta K. Jefferson, alleged that the

7-17-95 GRANTED AS TO
PUNITIVE DAMAGES
Mr. Kinner Judge



IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

MELVIN JEFFERSON, individually)
and as the Administrator of the)
Estate of ALBERTA K. JEFFERSON;)
LEON JEFFERSON and BENJAMIN)
JEFFERSON,)
Plaintiffs,)
vs.) Civil Action No.
CITY OF TARRANT, ALABAMA,) CV 94-4523
Defendant.)

STATEMENT OF CIRCUIT COURT JUDGE

On July 17, 1995, this court entered an interlocutory order denying the Motion for Summary Judgment and Motion for Judgment on the Pleadings of the Defendant, City of Tarrant, Alabama. Pursuant to Alabama Rule of Appellate Procedure 5(a), the undersigned Circuit Court Judge of Jefferson County, Alabama, certifies that said interlocutory order involves a controlling question of law as to which there is substantial ground for differences of opinion; than an immediate appeal from said interlocutory order would materially advance the ultimate termination of the litigation; and, that the appeal would avoid protracted and expensive litigation.

The interlocutory order addressed the following controlling question of law as to which there is substantial ground for difference in opinion: Whether the survival of Alberta K. Jefferson's claim for compensatory damages under 42 U.S.C. § 1983 is governed by federal common law or by reference to the Alabama wrongful death stat-

ute? In the interlocutory order, this court held that reference must be made to federal law and thereby followed *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). Previously, the Supreme Court of Alabama held that reference must be made to the Alabama act and a decedent's claim for compensatory damages under § 1983 does not survive. *Carter v. City of Birmingham*, 444 So.2d 373 (Ala. 1983), cert. den., 467 U.S. 1211, 104 S. Ct. 2401, 81 L. Ed.2d 357 (1984). Secondarily, the issue is whether the Circuit Courts of Alabama should follow the federal precedent, as this court did, or the authority of the Supreme Court of Alabama when interpreting federal statutes. Because a substantial ground for differences of opinion exists, and to avoid multiple trials and pretrial activity, the undersigned Circuit Court Judge certifies that the interlocutory order should be the subject of an appeal.

DATED: 17th day of July, 1995.

/s/ Drayton N. James
CIRCUIT COURT JUDGE
Drayton N. James

CV 94 004823 00
JUDGE: ROGER M. MONROE, DRAYTON N. JAMES

ALABAMA JUDICIAL DATA CENTER CASE ACTION SUMMARY CIRCUIT CIVIL					
IN THE CIRCUIT CIVIL COURT OF JEFFERSON COUNTY					
HELMIN JEFFERSON INDIV/ADM'R EST ALBERT JEFFERSON VS CITY OF TARRANT ALA					
FILED:	6/21/94	TYPE:	WRONGFUL DEATH	TYPE TRIAL:	JURY
DATE:	CA	CA DATE:		TRACK:	
DATED:	AMT:	1000000.00	PAYOUT:		
PLAINTIFF 001: JEFFERSON HELMIN INDIV/ADM'R EST ALBERTA H. JEFFERSON 1400 SOUTHTRUST TOWER ATTORNEY: PANTAZIS, DENNIS G					
SHAM:	AL 35203-				
PHONE:	205				
ENTERED:	6/29/94	ISSUED:		TYPE:	JUDGEMENT:
SERVED:		ANSWERED:			
PLAINTIFF 002: JEFFERSON LEON 1400 SOUTHTRUST TOWER ATTORNEY: PANTAZIS, DENNIS G					
SHAM:	AL 35203-				
PHONE:	205				
ENTERED:	6/29/94	ISSUED:		TYPE:	JUDGEMENT:
SERVED:		ANSWERED:			
PLAINTIFF 003: JEFFERSON BENJAMIN 1400 SOUTHTRUST TOWER ATTORNEY: PANTAZIS, DENNIS G					
SHAM:	AL 35203-				
PHONE:	205				
ENTERED:	6/29/94	ISSUED:		TYPE:	JUDGEMENT:
SERVED:		ANSWERED:			
DEFENDANT 001: TARRANT ALABAMA CITY OF CLERK CITY OF TARRANT ATTORNEY: *** PRO SE *** 1604 PINSON VALLEY PKWY TARRANT AL 35217- <i>John W. Clark Jr.</i>					
ENTERED:	6/29/94	ISSUED:	AL 19-95	TYPE:	
SERVED:	2-21-94	ANSWERED:		JUDGEMENT:	
DEFENDANT 002: TARRANT ALA CITY OF FIRE DEPT 204 FORD AVE ATTORNEY: *** PRO SE *** TARRANT AL 35217- <i>John W. Clark Jr.</i>					
ENTERED:	6/29/94	ISSUED:	AL 19-95	TYPE:	
SERVED:	2-21-94	ANSWERED:	AL 19-95	JUDGEMENT:	
6-21-94 BBC <i>Trial: ✓ JUL 31 1995</i>					
8-5-94 Date: Mon 6 Dec Not to exceed 10 days from date of filing and 10 days for produc					
8-5-94 Motion to dismiss filed on behalf of Plaintiff <i>John W. Clark Jr.</i>					
8-6-94 Case is hereby placed on the <i>John W. Clark Jr.</i>					
TRAIL ASSIGNMENT: STATUS CONFERENCE 10 SCHEDULED: 8-24-94 AT 9:00 A.M.					
LAW/062994 <i>John W. Clark Jr.</i>					

CV94-4523 MELVIN JEFFERSON V. CITY OF TARRANT, ALA.

Date	ACTIONS/JUDGMENTS/CASE NOTES
7/17/95	Motion To Dismiss Or, In The Alternative, To Strike "City of Tarrant, Alabama Fire Department" as Party Defendant is granted. <i>Drayton James</i> Judge Drayton James
7-17-95	Ptiffs submission sheet
2-17-95	Statement of Circuit Court Judge
2-10-95	Opps pretrial Submissions
"	Opps Obj to Ptsd exhibit list
2-14-95	Affidavit of Carl Harper
2-17-95	Depo witness list
2-25-95	Not of depo & rey for good
2-1-96	Letter from Harper (copy in file)
2-12-96	Not of depo of CH
9-9-96	Motion strike & for reconsideration
9-13-96	Ptiffs Obj to motion to strike & for reconsideration
9/17/96	Motion To Strike The Affidavit of Carl Harper And For Reconsideration of Denial of Summary Judgment is granted as to motion to strike affidavit of Carl Harper. Motion for reconsideration of denial of summary judgment is continued generally. Copy to counsel this date. <i>Drayton James</i> Judge Drayton James
9-26-96	Def C#1 - Mot & Compel
9-17-96	Notice of depo of EJM
11-12-96	Defr mot for Rule 5 J
11-2-96	City of Tarrant City, AL amendment to answer
11-19-96	Re-not of depo & rey for good EJM
11-26-96	Def C#2 mot for Rule 5 J granted as to Court II. J. J. James
1-17-97	2d amendment to answer

IN THE SUPREME COURT OF ALABAMA

August 23, 1995

1941573

Ex parte City of Tarrant, Alabama

PETITION FOR PERMISSION TO APPEAL

(Re: Melvin Jefferson, et al. v. City of Tarrant, Alabama (CV-95-4523))

ORDER

The petition for permission to appeal from an interlocutory order entered in the above cause having been filed and duly submitted to the Court, it is considered that the petition is due to be granted.

IT IS, THEREFORE, ORDERED, pursuant to the provisions of Rule 5, Alabama Rules of Appellate Procedure, that permission is hereby granted to the petitioner to appeal to this Court from the interlocutory order entered on July 17, 1995, in the case of Melvin Jefferson, et al. v. City of Tarrant, Alabama, Civil Action No. CV-95-4523.

IT IS FURTHER ORDERED that the petitioner shall, pursuant to Rule 5(c), Alabama Rules of Appellate Procedure, pay an additional \$50.00 docket fee, as provided by Rule 35A(4), Alabama Rules of Appellate Procedure; file a docketing statement (Form ARAP 24) in the trial court for transmittal to this Court; and file a security for costs as required by Rule 7, Alabama Rules of Appellate Procedure.

IT IS FURTHER ORDERED that the petitioner shall advise this Court, in writing, within seven (7) days filing

the entry of this order whether a transcript has been ordered. (See Rules 10 and 11, Alabama Rules of Appellate Procedure and Form ARAP 1, Notice of Appeal.)

Hornsby, C. J., and Maddox, Almon, Shores, Houston, Kennedy, Ingram, Cook, and Butts, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23rd day of Aug, 1995

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1996

1941573

City of Tarrant, Alabama

v.

Melvin Jefferson, et al.

Appeal from Jefferson Circuit Court
(CV-94-4523)

MADDOX, JUSTICE.

Pursuant to Rule 3, Ala.R.App.P., we permitted the defendant City of Tarrant to appeal from an interlocutory order in which the trial court held that the question of the survivability of Alberta K. Jefferson's cause of action for compensatory damages under 42 U.S.C. § 1983 was governed by federal common law rather than by Alabama's Wrongful Death Act, § 6-5-410, Ala. Code 1975. The plaintiff Melvin Jefferson, Alberta's son, sues individually and as a personal representative for the estate of the decedent. He alleges that Tarrant firefighters, based upon a policy of selectively denying fire protection to minorities, purposefully refused to attempt to rescue and revive Alberta.

Facts

Melvin Jefferson claims that city firefighters violated Alberta Jefferson's civil rights, specifically that they inten-

tionally, negligently, wantonly, or carelessly failed to attempt to extricate her from her burning house and thereby caused her wrongful death, a death that would be actionable under § 6-5-410, Ala. Code 1975. The defendant city moved for a judgment on the pleadings, specifically as to those claims seeking compensatory damages under 42 U.S.C. § 1983; the court denied the city's motion, and this Court permitted an appeal from the denial. The defendant city maintains that the question of the survivability of Alberta Jefferson's § 1983 cause of action against the municipality is governed by Alabama law rather than federal common law, and that the trial judge erred in holding otherwise when he denied the city's motion for a judgment on the pleadings.

Issue

Is the question of the survivability of Alberta Jefferson's cause of action for compensatory damages under 42 U.S.C. § 1983 governed by federal common law or by reference to the Alabama Wrongful Death Act. This Court addressed this same issue in *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983) cert. denied, 467 U.S. 1211 (1984). Also see, *Blair v. City of Rainbow City*, 542 So. 2d 275 (Ala. 1989). This issue arises because no federal statute provides for the survivability of § 1983 claims; moreover, federal law prohibits a § 1983 award of punitive damages against a municipality¹ and compensatory damages are not available under Alabama's Wrongful Death Act, which allows an award of punitive damages only.²

Analysis

The trial court was aware of this Court's holding in *Carter*, but held that *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), had, in effect, overruled *Carter*.

We have examined the principles of law stated in *Weeks* and have also re-examined the principles of law stated in *Carter*. We conclude that *Carter* correctly denied this issue. We should also note that the Supreme Court of the United States denied certiorari review of the *Carter* decision.

The rationale of *Weeks* appears to be that the application of § 6-5-410 in § 1983 actions is inconsistent with the Constitution and laws of the United States. The pertinent federal statute provides: "In all cases where [the laws of the United States] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same as not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause." 42 U.S.C. § 1988.

In *Carter* this Court, when confronted with this same issue, concluded that § 6-5-410 was not inconsistent with the Constitution and laws of the United States, citing *Robertson v. Wegmann*, 436 U.S. 584 (1978), which held that a § 1983 action would abate in accordance with Louisiana's survivorship statute. *Carter* is based in part upon *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), which held that compensatory damages are not recoverable in § 1983 actions based on Alabama's Wrongful Death Act. The *Brown* court distinguished the *Brown* case from *Robertson* by noting that the Louisiana

¹ *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

² See, e.g., *Atkins v. Lee*, 603 So. 2d 937 (Ala. 1992).

abatement statute “[was obviously more restrictive than the Alabama wrongful death act” and that, “like the Louisiana survival statute under consideration in *Robertson*, the Alabama death act should not be disregarded and cannot be considered ‘inconsistent’ with federal law merely because the statute provides for recovery of only punitive damages. *Brown*, 518 F. Supp. at 663-65, quoted in *Carter*, 444 So. 2d at 377. *Robertson* states simply that state law applies in § 1983 actions seeking recovery for wrongful death unless, upon application of § 1988, it is found to unduly restrict the federal claim, *Carter*, 444 So. 2d at 377, and it states that “[a] state statute cannot be considered ‘inconsistent’ [or unduly restrictive] with federal law merely because the statute causes the plaintiff to lose the litigation.” 436 U.S. at 593.

Furthermore, as noted earlier, the United States Supreme Court has held that a plaintiff cannot recover punitive damages against a municipality under § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Therefore, as *Carter* states: “[S]tate law affords a remedy beyond that now permitted under federal law—punitive damages. Thus, the application of state law . . . does not, in substance, abrogate plaintiff’s remedy against the city for violations of § 1983, but rather expands the recovery.” *Carter*, 444 So. 2d at 379 (emphasis omitted).

“The interests sought to be protected by the Alabama wrongful death statute closely parallel the interests to be protected where death results from violations [that give rise to liability under] § 1983. Thus, the purpose of § 1983 is not defeated, nor are cities insulated from liability under § 1983, because the law of Alabama does recognize an analogous cause of action [§ 6-5-410, Ala. Code 1975], affording an appropriate remedy in death cases.”

444 So. 2d at 380 (emphasis omitted).

This Court held in *Carter* that § 6-5-410, Ala. Code 1975, is not inconsistent with the Constitution and laws of the United States. We reaffirmed that holding in *Blair v. City of Rainbow City*, 542 So. 2d at 275 (Ala. 1989). We have re-examined the principles of law stated in *Carter* and *Blair*, and we conclude that the holding in those cases is still sound. The order of the trial court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Hooper, C.J., and Shores, and Kennedy, JJ., concur.

Butts, J., concurs in the result.

Houston and Cook, JJ., dissent.

City of Tarrant, Alabama v. Melvin Jefferson, et al.

HOUSTON, JUSTICE (dissenting).

I am faced with a dilemma. Should I adhere to the doctrine of state decisis, knowing that the precedent upon which I rely (*Tatum v. Schering Corp.*, 523 So.2d 1042, 1049-63 (Ala. 1988)) was wrongly decided? To follow it would be to deny the plaintiff Melvin Jefferson a remedy. Or should I follow the law as I believe it to be, although what I believe the law to be is contrary to the opinion of the majority? To follow what I believe the law to be would afford Melvin Jefferson, as personal representative of the estate of Alberta K. Jefferson, deceased, a remedy through his action under 42 U.S.C. § 1983. If a constitutional doctrine was involved, I would follow Justice Scalia's dissent in *BMW of North America, Inc. v. Gore*, [Ms. 94-896, May 20, 1996] , ___ U.S. ___, ___ S.Ct. ___ (1996), as I did in *Ex parte Knotts*, [Ms. 1950239, July 12, 1996], ___ So.2d ___ (Ala. 1996) (Houston, J., concurring in the result). In this case, no constitutional issue is involved; however, I am convinced that this Court has erroneously interpreted Ala. Code 1975, § 6-5-410 (to hold that only punitive damages can be recovered in wrongful death cases), and I cannot expand this erroneous interpretation of § 6-5-410 to § 1983 actions and deprive Melvin Jefferson (or other plaintiffs similarly situated) of a right to a remedy, which after much research and analysis, I wholeheartedly believe that he and those similarly situated have. *Tatum v. Schering Corp.*, supra (Houston J., dissenting). Therefore, I respectfully dissent.

City of Tarrant, Ala. v. Melvin Jefferson, et al.

COOK, JUSTICE (dissenting).

I respectfully dissent. This Court should affirm the trial court's holding that application of the state's wrongful death statute in this fact situation would be inconsistent with the policy underlying the 42 U.S.C. § 1983 cause of action.

The majority's holding that Alabama's wrongful death statute determines whether Alberta Jefferson's § 1983 federal cause of action survives is based on this Court's opinion in *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), and *Blair v. City of Rainbow City*, 542 So. 2d 275 (Ala. 1989). I agree with the reasoning of Justice Jones and Justice Adams, who wrote specially in *Carter* and *Blair*, respectively, and who disagreed with the idea that Alabama municipalities are exempt from a wrongful death action under § 1983 because the state recognizes an analogous cause of action.

This Court in *Carter*, based on an analysis of *Robertson v. Wegmann*, 436 U.S. 584 (1978) (holding that a § 1983 action would abate in accordance with Louisiana's survivorship statute), and *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), determined that a close parallel exists between the interests being protected in actions brought under the Alabama Wrongful Death Statute and interests involved in cases where death results from violations that would give rise to liability under § 1983. Therefore, *Carter* reasoned, the purpose of § 1983 was not defeated, because under the Alabama Wrongful Death Act an appropriate remedy is provided in death cases.

The view more in accord with the policy of § 1983 is expressed in the more recent opinion of *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). In *Weeks*, the administratrix of a deceased county jail inmate sued Baldwin

County commissioners and others under § 1983, alleging violations of the inmate's rights. Judge Hand recognized in *Weeks* that (1) the *Robertson* holding was a narrow one, limited to situations in which the application of the state survivorship law does not adversely affect the § 1983 policies of compensation and deterrence, and (2) that the *Robertson* analysis could not defend the strict application of the state's wrongful death statute in cases where alleged wrongful acts of a municipality or county resulted in the decedent's death. Such an application would allow those entities to operate with immunity from § 1983 actions based on deprivations of constitutional rights, so long as the victims of those deprivations die. *Weeks*, 649 F. Supp. at 1305-06. Providing what is in essence partial immunity to municipalities in death cases is inconsistent with the § 1983 policy of deterrence. Addressing this issue, Judge Hand wrote:

"A strict application of the Alabama wrongful death statute in cases involving municipal or county liability cannot be justified under the *Robertson* court's analysis. The Alabama statute provides for the recovery only of punitive damages, but municipalities and counties are immune from these damages in actions under § 1983. Thus, the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages, at least in cases where the decedent's death resulted from their wrongful acts. Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under § 1983 for acts that cause deprivations of constitutional rights as long as the victims die. The policy of deterrence of official misconduct that [underlies] § 1983 would obviously be severely undermined if the Alabama wrongful death statute is applied in a way that

eliminates municipal and county liability in such cases. Moreover, § 1983's policy of compensating the victims of official misconduct would also be undermined. The *Robertson* Court specifically noted that its decision was not intended to 'preclude recovery by survivors who are suing under § 1983 for injury to their own interests.'

649 F. Supp at 1305-06.

In *Robertson*, the decedent had no immediate survivors, so the executor was suing only on the estate's behalf. Alberta Jefferson has several survivors including the plaintiff Melvin Jefferson.

I agree with Justices Jones and Adams that "[w]e should either fashion a remedy allowing recovery of compensatory damages, or we should resort to the federal common law of survival, which allows compensatory damages as the appropriate relief." *Carter*, 444 So. 2d at 380 (Jones, J., concurring in part and dissenting in part); *Blair*, 542 So. 2d at 278 (Adams, J., concurring specially and quoting Justice Jones's statement). Moreover, because I also agree with the analysis in *Weeks*, that Alabama's wrongful death statute should not be held to foreclose the recovery of compensatory damages under § 1983, I respectfully dissent.

IN THE SUPREME COURT OF ALABAMA

August 30, 1996

1941573

City of Tarrant, Alabama Melvin Jefferson, et al.
 (Jefferson: CV-94-4523

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

MADDOX, J. — Hooper, CJ., Shores, Kennedy and Butts, JJ., concur.; Houston and Cook, JJ., dissent.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 30 day of Aug, 1996

/s/ Robert G. Esdale
 Clerk, Supreme Court of Alabama

Dennis G. Pantazis, Esq.
 1400 South Trust Tower
 Birmingham, Alabama 35203

Re: 96-957 - Melvin Jefferson, individually and as the Administrator of the Estate of Alberta K. Jefferson, Leon Jefferson and Benjamin Jefferson v. City of Tarrant, Alabama

Dear Mr. Pantazis:

The Court today entered the following order in the above stated case:

"The petition for a writ of certiorari is granted limited to the following question: 'Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Section 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. Section 1983?'"

Enclosed are Memoranda describing the procedures under the Rules, together with a Specification Chart for your use. To further assist you in preparing your case before this Court, a copy of the Guide for Counsel is enclosed. Although this case will not be calendared for oral argument this Term, please note that requests for extensions of time to file briefs on the merits are not favored.

If you have any questions, please feel free to telephone
me.

Very truly yours,
WILLIAM K. SUTER, CLERK
/s/ Sandy Nelson
Sandy Nelsen
Merits Clerk
(202) 479-3032

Enclosures

Supreme Court, U.S.
FILED

No. 96-957

(5)

MAY 15 1997

CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Alberta K. Jefferson;

LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

v.

CITY OF TARRANT, ALABAMA,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

BRIEF OF PETITIONERS

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I. QUESTION PRESENTED

Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, § 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. § 1983?

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BRIEF OF PETITIONERS

II. OPINION BELOW

The Circuit Court of Jefferson County, Alabama did not write an opinion in this case. The opinion of the Alabama Supreme Court is reported at 682 So. 2d 29 (Ala. 1996). The opinion of the Alabama Supreme Court is reproduced in the Appendix to the Petition for Writ of Certiorari filed herein (Pet. App. A-I).

III. JURISDICTION

The Alabama Supreme Court released its opinion on July 12, 1996. Rehearing was denied by the Alabama Supreme Court on August 30, 1996. The Petition for Writ of Certiorari was filed with this Court within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257. On March 31, 1997, this Court issued an order granting the Petition for Writ of Certiorari to consider the following question:

Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, § 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. § 1983?

IV. STATUTORY PROVISIONS INVOLVED

The statutes involved in this appeal are 42 U.S.C. § 1983, 42 U.S.C. § 1988, and Ala. Code § 6-5-410 (1975), which are reproduced in the Appendix to the Writ for Certiorari at Appendix A-II.

V. STATEMENT OF THE CASE

Petitioners, Melvin Jefferson, individually and as the Administrator of the Estate of Alberta K. Jefferson, Leon

Jefferson, and Benjamin Jefferson, sued the City of Tarrant, Alabama in the Circuit Court for Jefferson County, Alabama. The Complaint was filed on or about June 20, 1994.

A. The Underlying Action

The action arises out of a fire on December 4, 1993 at 6017 57th Street North, Tarrant City, Alabama. This address was the residence of plaintiff Benjamin Jefferson, and Alberta K. Jefferson, the decedent. Mrs. Jefferson was an elderly black woman who had both of her legs amputated as the result of diabetes, and was only able to get about by the use of a wheelchair. The fire resulted in the death of Alberta K. Jefferson.

The evidence before the trial court was that the firefighters were aware that this house was located in a predominantly black section of Tarrant, Alabama. The City of Tarrant Fire Department personnel, including the acting chief, were aware of the neighborhoods in their territory that were predominantly black, and which were predominantly white. The firefighters described the neighborhood where this fire took place as not typical for Tarrant, and "a little bit more unkempt".

The evidence before the trial court was that the City of Tarrant Fire Department did not treat black and white sections of town equally. This disparity of treatment between the predominantly black sections of town and the predominantly white sections of town, and the death of Alberta K. Jefferson, led to the filing of a claim under 42 U.S.C. § 1983 for the denial of equal protection of the laws to black citizens. Plaintiffs' claim is that a pattern and custom of denying protective services to disfavored minorities exists in the City of Tarrant, Alabama, and led to the death of Mrs. Jefferson. The denial of protective services to disfavored minorities are generally redressable by § 1983 actions. *See, Moody v. City of Hoboken*, 758 F.

Supp. 1027, 1031 (D.N.J. 1991), citing *DeShaney v. Winnebago County*, 109 S.Ct. 998 (1989) (State "may not . . . selectively deny its protective services to certain disfavored minorities without violating the equal protection clause.")

B. Proceedings Below

This lawsuit was initiated by the filing of a Complaint on June 20, 1994. One of the plaintiffs, Melvin Jefferson, brought the action both individually, and as the personal representative of the decedent, Alberta K. Jefferson. Melvin Jefferson, as the representative of Alberta K. Jefferson's estate, brought state law claims under Ala. Code §6-5-410 (1975), the Alabama Wrongful Death Act, and pursuant to 42 U.S.C. § 1983. Leon and Benjamin Jefferson, and Melvin Jefferson in his individual capacity, brought claims for intentional infliction of emotional distress, and for the Alabama common law tort of outrage.

The Circuit Court for Jefferson County, Alabama, considered a motion for summary judgment and a motion for judgment on the pleadings, together with evidentiary exhibits. This appeal arises out of the Circuit Court for Jefferson County, Alabama's ruling, and the Supreme Court of Alabama's reversal thereof, on the legal issue presented by the City of Tarrant, Alabama's Motion for Judgment on the Pleadings.

The trial court denied the City of Tarrant's Motion for Judgment on the Pleadings, but entered a Statement of the Circuit Court Judge certifying that the interlocutory order denying the Judgment on the Pleadings for the City of Tarrant, Alabama involved a controlling question of law suitable for immediate appeal pursuant to Rule 5 of the Alabama Rules of Appellate Procedure. The City of Tarrant, Alabama filed a petition for permission to appeal from the trial court's Order on July 17, 1995. On August 23, 1995, the Alabama Supreme Court entered an

order permitting the City of Tarrant, Alabama to appeal from the interlocutory order entered on July 17, 1995.

On July 13, 1996, the Alabama Supreme Court reversed the ruling of the Circuit Court for Jefferson County, Alabama, and remanded the case for further proceedings, holding that an action against a municipality under 42 U.S.C. § 1983 could not lie where a death resulted from the wrong complained of by the plaintiff. The Alabama Supreme Court in this case relied upon *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), cert. denied 467 U.S. 1211 (1984), in making its decision, and specifically rejected the holding in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), which held that the application of the Alabama Wrongful Death Act in *Carter* was inconsistent with the underlying purposes of 42 U.S.C. § 1983. The Court denied a timely filed motion for rehearing on July 30, 1996.

VI. SUMMARY OF THE ARGUMENT

This is a case brought under 42 U.S.C. § 1983 where death resulted from the constitutional deprivation complained of. The civil rights statutes, 42 U.S.C. § 1981 *et seq.* are deficient in that they do not provide a survivorship provision. No survivorship provision is provided even though it has long been held that death is an injury that is covered by § 1983 actions.

The statutory framework of the Civil Rights Act of 1871, however, provides a method for filling this gap at 42 U.S.C. § 1988. Section 1988 provides that where the civil rights statutes (including § 1983) are deficient in the provisions necessary to furnish suitable remedies, "The common law, as modified and changed by the Constitution and statutes of the state wherein the Court having jurisdiction . . . so far as the same is not inconsistent with the laws of the United States, shall extend to and

govern the said Courts . . ." 42 U.S.C. § 1988 (emphasis added).

This Court in *Robertson v. Wegman*, 98 S.Ct. 1991 (1978) set out a test for determining whether the application of state law is inconsistent with the Constitution and statutes of the United States. That test is whether application of the state survivorship provision would be inconsistent with the federal policy underlying the cause of action. *Robertson*, 98 S.Ct. at 1991. The Court went on to hold that the two federal policies underlying § 1983 actions are compensation of injured parties, and prevention of abuses of power by those acting under color of state law. *Robertson*, 98 S.Ct. at 1995.

The Alabama Supreme Court, following the decision in *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), cert. denied 104 S.Ct. 2401 (1984), has applied the Alabama Wrongful Death Act, Ala. Code § 6-5-410 (1975) in a manner that totally eliminates § 1983 liability for municipalities when death results from the constitutional wrong. Defendant argued, and the Alabama Supreme Court agreed, that because the Alabama Wrongful Death Act provides for punitive damages only, and because the U. S. Supreme Court held in *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981), that municipalities are immune from punitive damages, no § 1983 death claims can lie against Alabama municipalities.

It is obvious why this construction is inconsistent with the purposes behind § 1983. Elimination of § 1983 claims in death cases against municipalities provides neither compensation nor deterrence. Given the alternative of elimination, the only federal court to decide the question, *Weeks v. Benton*, 649 F. Supp. 1297, 1305 (S.D. Ala. 1986), held that the Alabama Wrongful Death Act should not apply in a way that would eliminate § 1983 liability for municipalities when death occurs from the deprivation, and allowed for a compensatory damages remedy.

This Court used the same reasoning in *Carlson v. Green*, 100 S.Ct. 1468 (1980). *Carlson* was a *Bivens* action on behalf of a deceased federal prisoner in Indiana. The applicable Indiana death statute, if applied, would have so limited damages as to lead for the dismissal of the action. In that case, the Court held that the federal common law should be looked to for the survival of the action where the state statute would abate the federal cause of action. *Carlson*, 100 S.Ct. at 1474.

The *Carlson* Court, citing *Robertson*, made the analogy between the federal interests to be protected in a *Bivens*-type action and a § 1983 claim. Similarly, the lower federal courts have overwhelmingly held that where the survival statute of the forum state bans or limits the remedies available to § 1983 litigants, the state survival statute is manifestly inconsistent, must be disregarded, and the federal common law looked to provide an adequate remedy. See cases cited *infra*.

The Alabama Wrongful Death Act remedy, which is what remains against a municipality if § 1983 claims are eliminated, is particularly ineffective as a deterrent, or as compensation, as it is capped by Ala. Code § 11-93-2 at \$100,000.00. In 1997, this is a less than significant remedy. However, even if the Alabama Wrongful Death Act did provide an adequate remedy, its availability has no effect on whether a § 1983 claim should abate as § 1983 claims are supplementary to any state remedies provided. Section 1983 claims provide for particularly federal remedy for constitutional incursions. *Monroe v. Pape*, 81 S.Ct. 473 (1961).

In short, the application of the Alabama Wrongful Death Act to § 1983 death claims in a way that completely insulates municipalities from the federal claim, leaving the parties with only a severely restricted state law cause of action, is inconsistent with the federal policies underlying § 1983 liability. Courts throughout the country have realized that state restrictions such as this on § 1983

claims must yield. The Alabama Supreme Court, however, has not come to this realization. The only way to bring the Alabama courts into line with the well-accepted federal authority, and with the purposes behind § 1983 liability, is by a reversal in this case.

VII. ARGUMENT

A. State Survivorship Provisions Only Apply To § 1983 Claims, If At All, By Reference To 42 U.S.C. § 1988, Which Specifically Limits The Application Of State Law.

Plaintiffs have made a claim under 42 U.S.C. § 1983 arising out of the death of Alberta K. Jefferson. The issue in this case arises out of the lack of a survival provision in § 1983. The remedy to this "gap" is provided by 42 U.S.C. § 1988 which provides that where the federal civil rights laws are deficient, "common law, as changed by the Constitution and statutes of the state wherein the Court having jurisdiction . . . shall extend to and govern . . ."¹

¹There can be little doubt that § 1983 was intended to act as a remedy where the constitutional deprivation results in death, as well as when those deprivations result in a lesser injury. The Court in *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), stated "The general legislative history of the 1871 Act makes clear that death was among the civil rights violations that congress is intended to remedy." *Berry*, 900 F.2d at 1501, citing *Monroe v. Pape*, 81 S.Ct. 473, 477-78 (1961). The *Berry* Court went on to quote at length from the floor debate concerning the proposed civil rights act of 1871.

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective . . . If there is no remedy for this, if the rights of citizenship may be denied without redress, if the Constitution may not be enforced, if life and liberty may not be effectively protected, then, indeed, is our Government a failure, and instead of enjoying liberty regulated by

However, the applicability of state law, if it is to be applied at all, is specifically limited by the plain language of § 1988:

but in all cases where they [federal civil rights statutes] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law . . . *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern said courts in the trial and disposition of the cause . . .

42 U.S.C. § 1988 (emphasis added). In *Robertson* the Court recognized the lack of a survivorship provision in § 1983 to be a case wherein the civil rights statutes are “deficient in the provisions necessary to furnish suitable remedies . . .” *Robertson*, 98 S.Ct. at 1994.

The *Robertson* court looked to state statutory law, modifying the common law, as the starting point in determining the survivability of § 1983 actions.² *Robertson*, 98 S.Ct. at 1991. The Court, however, held that the application of state survivorship statutes is significantly restrained by the plain language of § 1988. “[S]tate law **may not be applied** when it is ‘inconsistent with the Constitution and laws of

law, its subjects may live only by the sufferance of lawless and exasperated conspirators.

Berry, *Id.*, quoting Cong. Globe, 42nd Cong., 1st Sess. 236, at 374 (1871).

²While the *Robertson* Court spoke in terms of applying state survivorship law, there is no question that the question of survivorship of a § 1983 action is, ultimately, one of federal law. *Robertson*, 98 S.Ct. at 1994 (“Regardless of the source of the law applied in a particular case, however, it is clear that the ultimate rule adopted under § 1988 ‘is a federal rule responsive to the need whenever a federal right is impaired.’”), quoting *Moor v. County of Alameda*, 93 S.Ct. 1785, 1792 (1973).

the United States.” *Robertson*, *Id.*, citing § 1988 (emphasis added).³

1. The Proper Rule Regarding The Application Of State Survivorship Provisions To § 1983 Actions Is Articulated In *Robertson v. Wegman*.

The Court in *Robertson*, *supra*, considering the question of inconsistency between state and federal law raised by § 1988’s directive, set out a test for determining whether the application of a state survivorship provision is incon-

³The *Robertson* Court noted that § 1988’s reference to the common law might be interpreted two ways: as a reference to the decisional law of the forum state, or as a reference to federal common law. *Robertson*, 98 S.Ct. at 1995, n.5. Without specifically holding that state survivorship law should be disregarded in favor of federal common law when it is found to be in conflict with federal law, the *Robertson* Court set out a test for when the state law should be disregarded, *see, Robertson*. That test, discussed *infra*, is an analysis of state survivorship law with the provision that it not be applied in a way that is inconsistent with federal law.

In *Carlson v. Green*, 100 S.Ct. 1468 (1980), the Court took the next step, holding that federal common law was to be looked to when a state survivorship provision is found to be inconsistent with the purposes behind a federal cause of action. In *Carlson*, the Court was presented with the question of whether to apply an Indiana survivorship provision which would have severely restricted the remedy available to the plaintiff in a *Bivens* action. The Court held that “whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.” *Carlson*, 100 S.Ct. at 1474, quoting and adopting as its holding the decision below at 581 F.2d 669, 674-75 (7th Cir. 1978). The Court came to the conclusion that state survivorship provisions apply, but not to the extent that a § 1983 claim is abated where the constitutional deprivation complained of causes death. Whether the survivorship “vehicle” is labelled a limited application of the state survivorship law, or as federal common law is of little consequence. Under the *Robertson* analysis, *infra*, the claim either survives or abates according to whether the policies underlying § 1983 are met.

sistent with federal law. That test is, "whether application of state law would be inconsistent with the federal policy underlying the cause of action under consideration." *Robertson*, 98 S.Ct. at 1995, quoting *Johnson v. Railwa* *Ex-*
expenses Agency, Inc., 95 S.Ct. 1716, 1722 (1975).⁴

The *Robertson* Court held that the policies underlying § 1983 claims include "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson*, 98 S.Ct. at 1995 (citations omitted).

The application of the Alabama Wrongful Death Act urged by Defendant would neither compensate those injured by a municipalities' deprivation of civil rights in Alabama, nor would it prevent any unlawful action by Alabama municipalities. The reason Defendant's construction would not compensate or deter is because

⁴At least two lower federal courts have broken the *Robertson* holding into a three part test for whether the state law survivorship provision should be applied. The *Berry* Court stated the *Robertson* test as follows:

Section 1988 first directs that courts look to federal law "so far as such laws are suitable to carry [the civil and criminal] civil rights statutes] into effect. 42 U.S.C. § 1988. Second, if federal law is "not adapted to the object" or is "deficient in the provisions necessary to furnish suitable remedies and punish offenses," courts must consider borrowing the law of the forum state. *Id.* Third, the federal court must reject the application of the state law if it is "inconsistent with the Constitution and laws of the United States." *Id.*

Berry, 900 F.2d at 1503. Similarly, the Court in *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1188 (7th Cir. 1985), held that § 1988 established a three-step process for the selection of the appropriate substantive law in civil rights actions. In any case, however, "If the state law is inconsistent, it must be disregarded in favor of the federal common law." *Id.* citing *Robertson, supra*, and *Bell v. City of Milwaukee*, 746 F.2d 1207, 1234 (7th Cir. 1984).

Defendant's construction would immunize municipalities in Alabama from § 1983 actions where death occurs as a result of the unconstitutional action. Defendant, citing *Carter*, argues that because the Alabama Wrongful Death Act provides for punitive damages only, and because the U. S. Supreme Court held in *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981) that municipalities are immune from punitive damages, a § 1983 claim cannot lie against a municipality where the constitutional injury results in death.

Only one federal court has directly considered the application of the Alabama Wrongful Death Act using the *Robertson* analysis. The Court in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), squarely applied the *Robertson* decision in considering the correct application of the Alabama Wrongful Death Act in cases in which the constitutional deprivation complained of caused death. The *Weeks* Court began its analysis:

Correct analysis requires a determination of whether the application of a state statute in a particular case has the result not merely of causing the plaintiff's claim to fail, but also of undermining the policies of compensation and deterrence underlying § 1983.

Weeks, 649 F. Supp. at 1305, citing *Robertson*.

Given this analysis, it is obvious that Defendant's argument cannot be consistent with the purposes of § 1983. The *Weeks* court succinctly stated why the *Carter* application is inconsistent with federal law:

A strict application of the Alabama wrongful death statute in cases involving municipal or county liability cannot be justified under the *Robertson* court's analysis. The Alabama statute provides for the recovery only of punitive damages, but municipalities and counties are immune from these damages in actions under § 1983. Thus, the strict application of the Ala-

bama statute in such cases would result in the complete immunization of those entities from damages, at least in cases where the decedent's death resulted from their wrongful acts. Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under § 1983 for acts that cause deprivations of constitutional rights as long as the victims die. The policy of deterrence of official misconduct that underlines § 1983 would obviously be severely undermined if the Alabama wrongful death statute is applied in a way that eliminates municipal and county liability in such cases. Moreover, § 1983's policy of compensating the victims of official misconduct would also be undermined.

Weeks, 649 F. Supp. at 1305.

Mindful of the goals of compensation and deterrence in a § 1983 claim, *see, Hardin v. Straub*, 490 U.S. 536, 539 (1989) (Chief goals of § 1983 action are compensation and deterrence); *Board of Regents of University of New York v. Tomanvo*, 446 U.S. 478, 488 (1980); *Owen v. City of Independence*, 445 U.S. 622, 631 (1980), the *Weeks* Court held that compensatory damages are allowable against an Alabama municipality on a § 1983 claim.

This Court therefore holds that, in actions under § 1983, where the liability of a municipality, county, or other local governmental entity is at issue, and where the alleged unconstitutional acts result in the death of the victim, the Alabama wrongful death act should be applied only to the extent that the decedent's action is permitted to survive. The wrongful death statute should not be held to foreclose the recovery of compensatory damages against the governmental entity in question, for such a result would be inconsistent with the policies underlying § 1983.

Id.

A construction that insulates Alabama municipalities from § 1983 liability in death cases is not only inconsistent with the purposes underlying § 1983, but a perverse incentive is created whereby death, under the law, is preferable to a lesser injury. If, for example, a police officer were to use unnecessary and unreasonable force in an arrest, it would be preferable under Defendant's theory for the potential plaintiff to be bludgeoned to death rather than merely maimed, for when life evaporates, the plaintiff's § 1983 claim would also. *See, Sager v. City of Woodland Park*, 543 F. Supp. 282, 296 (D. Colo. 1982) (It would be anomalous and ironic to hold that the plaintiff could seek redress if he survives, but because the deprivation caused death, the law provides no remedy "Allowing recovery for injury but denying relief for the ultimate injury - death would mean that it would be more advantageous for the tortfeasor to kill rather than to injure. Surely this cannot be the intent of the law.") Such a construction not only defies logic, but is inconsistent with a cause of action that has the stated purpose of deterring official misconduct, and compensating its victims.⁵

⁵Defendant has argued below that in *Robertson*, the Court found a Louisiana statute which allowed a § 1983 claim to evaporate was found not to be inconsistent with federal law, and therefore the holding in *Carter* should likewise not be found inconsistent. This is not true. In *Robertson*, the plaintiff died *after* the institution of the § 1983 action, and his claim abated because there was no surviving relative who could maintain the action under the Louisiana survivorship statute. This was not considered inconsistent only because the deprivation of civil rights in that case had no bearing on the death and subsequent abatement. The Court held:

A different situation might well be presented, as the District Court noted, if state law "did not provide for the survival of any tort actions" [citation omitted] or if it significantly restricted the types of actions that survive . . . We intimate no view, moreover, about whether abatement based on state

2. The Weeks Court Followed This Court's Reasoning In *Carlson v. Green*.

The Weeks decision follows this Court's reasoning in *Carlson v. Green*, 100 S.Ct. 1468 (1980). In *Carlson*, Plaintiff brought an action for damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 91 S.Ct. 1999 (1971), on behalf of a deceased federal prisoner in Indiana.⁶ The applicable Indiana statute, if applied, would have failed to provide damages sufficient to meet the jurisdictional limit of the federal courts, leading to dismissal of the case. The issue presented to the Court was: "Is survival of the cause of action provided by federal common law or by state statutes?" *Carlson*, 100 S.Ct. at 1471. The Court looked to the federal common law to provide for the survivorship of the cause of action.

In sum, we hold that whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.

Carlson, 100 S.Ct. at 1474, quoting and adopting as its own, the holding in *Carlson v. Green*, 581 F.2d 669, 675 (7th Cir. 1978).

law could be allowed in a situation in which deprivation of federal rights caused death.

Robertson, 98 S.Ct. at 1997. Contrary to Defendant's contention, *Robertson* in no way holds that state law depriving a § 1983 litigant of a cause of action arising out of said deprivation is not inconsistent with federal law and the principles underlying § 1983.

⁶While *Carlson* was a *Bivens* action alleging a violation of a prison inmate's Eighth Amendment proscription against cruel and unusual punishment, the Court found *Bivens* actions to serve purposes similar to § 1983 actions, and made the analogy between *Bivens* actions and § 1983 claims. *Carlson*, 100 S.Ct. at 1473, n.6., citing *Robertson*, *supra*.

The Tenth Circuit Court of Appeals in *Berry*, *supra*, recognized the analogy made to *Robertson* and § 1983 claims by the *Carlson* Court. The *Berry* Court held, as the *Carlson* Court did when deciding the survivorship of *Bivens* actions, that there must be fashioned "a federal remedy to be applied to § 1983 death cases." *Berry*, 900 F.2d at 1506, citing *Jaco v. Bloechle*, 739 F.2d 239, 245 (6th Cir. 1984) (Where survival statutes of the forum state are hostile to promoting deterrence, protection and vindication against § 1983 infringements, federal court must allow survival). Similarly, an application of the Alabama Wrongful Death Act that would insulate municipalities from § 1983 liability is hostile to the purposes of § 1983, and must be disregarded in favor of a federal survivorship remedy.

B. The Vast Weight Of Lower Court Authority Rejects State Law Limitations On § 1983 Remedies.

1. Courts Have Consistently Held That State Laws Damage Restrictions Such As Alabama's Wrongful Death Act Are To Be Disregarded When They Conflict With § 1983 Policy.

The Weeks analysis is well-accepted across the nation as the proper application of the *Robertson* test. The federal courts have uniformly refused to apply state wrongful death statutes in a way that would limit the remedies available to a § 1983 claimant when the deprivation complained of caused the death. In *Berry*, the Court refused to apply an Oklahoma survivorship statute that would limit damages to property loss and lost-earnings between the time of injury and death. The Court held such a statute to be "clearly deficient in both its remedy and deterrent effect. *Berry*, 900 F.2d at 1504. Instead, a federal rule of survivorship providing for compensatory damages, loss of income potential, loss of consortium, and punitive damages was applied.

Similarly, in *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983), cert. denied, 464 U.S. 961 (1983), the Court held that the application of a state provision in a manner that would limit the remedies available to a § 1983 litigant is inconsistent with the Constitution and laws of the United States. In *McFadden*, a § 1983 action was brought against a police officer arising out of the shooting of the plaintiff's decedent by the officer. The jury awarded punitive damages to the plaintiff. The defendant appealed, arguing that punitive damages in such cases were barred by a New York statute preventing the survival of claims for punitive damages. The Second Circuit, relying on the *Robertson* analysis, stated the following:

we have no doubt that limitations in a state survival statute have no application to a section 1983 suit brought to redress a denial of rights that caused the decedent's death. [citations omitted] To whatever extent section 1988 makes state law applicable to section 1983 actions, it does not require deterrence to a survival statute that would bar or limit the remedies available under section 1983 for unconstitutional conduct that causes death. State law that would preclude a claim for punitive damages in a case like the present one is manifestly "inconsistent" with federal law within the meaning of section 1988.

McFadden, 710 F.2d at 911. The Alabama Supreme Court's holding in *Carter* and in this case would completely immunize municipalities from § 1983 liability in death cases. Under *Carlson* and the cases cited *infra*, such a construction is "clearly deficient in both its remedy and deterrent effect", and is "manifestly inconsistent" with federal law.

The *Berry* and *McFadden* holdings have been echoed throughout the country. See, *Heath v. City of Hialeah*, 560 F. Supp. 840 (S.D. Fla. 1983) (refusing to apply Florida

statute's ban on the recovery of decedent's damages); *Sager v. City of Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982) (refusing to apply restrictions on recoverable damages in Colorado statutes); *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345 (E.D. Va. 1981) (refusing to apply the Virginia wrongful death statute's bar on recovery of decedent's damages or punitive damages); *Jaco v. Bloechle*, 739 F.2d 239 (6th Cir. 1984) (Disregarded Ohio statute that would have abated cause of action as "hostile to 'the Constitution and laws of the United States'"); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (held that it would be inconsistent with federal laws to limit estate of decedent to \$25,000.00 Wisconsin statutory amount in § 1983 death claim); *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985) (State law precluding recovery for loss of life inconsistent with deterrent policy of § 1983). *Linzie v. City of Columbia, Mo.*, 651 F. Supp. 740 (W.D. Mo. 1986) (Missouri prohibition of survival claim for punitive damages subverts both compensation and deterrence policies underlying § 1983); *Williams v. City of Oakland*, 915 F. Supp. 1074, 1077 (N.D. Cal. 1996) (Denial of pain and suffering damages to plaintiff in a § 1983 death case because of a California survivorship statute "would strike at the very heart of a § 1983 action"). In each of these cases, the state survivorship provision that would have limited a § 1983 death claimant's damages was disregarded, and a survivorship remedy under the federal common law was applied.

These cases illustrate the well-settled principle that local forms of practice cannot defeat established federal rights. *Felder v. Casey*, 108 S.Ct. 2302 (1988). In *Felder*, a motion to dismiss was granted a municipal defendant on a § 1983 claim because the plaintiff failed to comply with Wisconsin's notice-of-claim statute. The Court held that the notice-of-claim statute could not act as a bar to a federal § 1983 action. In reaching its decision the *Felder* Court held:

Just as federal courts are constitutionally obligated to apply state law to state claims, *see Erie B. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such a manner that all the substantial rights under controlling federal law are protected."

Felder, 108 S.Ct. at 2313-14, citing *Garrett v. Moore McCormack Co.*, 63 S.Ct. 246, 251 (1942). Similarly, if the Alabama Wrongful Death Act is applied as Defendant urges, the substantive rights of equal protection denied Mrs. Jefferson cannot be remediated.

The *Felder* Court, in refusing to allow a state notice of claim statute to abrogate an otherwise proper § 1983 claim, realized the supremacy of the federally created right in such cases:

Thus, § 1983 provides "a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation," *Mitchum v. Foster*, 407 U.S. 225, 239, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972), and is to be accorded "a sweep as broad as its language." *United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267 (1966).

* * *

Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy.

Felder, 108 S.Ct. at 2307. The Alabama Supreme Court has refused to follow this mandate. Both *Carter* and the present case illustrate its utter disdain for the principle of supremacy articulated in *Felder*.

In the face of voluminous authority to the contrary, the Alabama Supreme Court, following *Carter*, has continued to apply the Alabama Wrongful Death Act in a way that not only limits the remedies available to a § 1983 litigant on a death claim - it eliminates the claim entirely. The Alabama Supreme Court's holding is obviously and manifestly inconsistent with the purposes underlying § 1983, and rests on an argument consistently rejected across the country. The only way to bring the Alabama Supreme Court into line with well-accepted federal authority is to reverse the decision of that Court in this case.

2. No Federal Court Has Held That A § 1983 Claim On A Death Evaporates Due To The Application Of The Alabama Wrongful Death Statute.

The *Weeks* court followed the well-reasoned line of cases cited *supra*, and held that compensatory damages should be allowed in a § 1983 death claim in Alabama, even where the state wrongful death statute does not provide such a remedy. Similarly, in *Gilmere v. City of Atlanta*, 864 F.2d 734 (11th Cir. 1989), the Eleventh Circuit recognized that an application of Alabama's Wrongful Death Act in a fashion that would eliminate § 1983 liability for municipalities is inconsistent with the purposes of § 1983:

The Alabama Wrongful Death Statute, Ala. Code § 6-5-410, provides only for assessment of punitive damages. *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), cert denied, 467 U.S. 1211, 104 S.Ct. 2401 (1984). Because this statute is inconsistent with the rule that damages in § 1983 actions are to be compensatory, reliance on the Alabama wrongful death statute would not be proper under § 1988. *See, Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986).

Gilmere, 864 F.2d at 740, n. 7. It is clear that the federal courts passing on the issue have seen the inconsistency in applying the Alabama Wrongful Death Act to § 1983 actions.

Respondent has attempted to argue throughout this litigation that the cases of *Brown v. Morgan County*, 518 F. Supp. 661 (N.D. Ala. 1981), *James v. Murphy*, 392 F. Supp. 641 (M.D. Ala. 1975), and *Pollard v. United States*, 384 F. Supp. 304 (M.D. Ala. 1974), somehow support its position. That is simply not the case. In *James*, the Court did not pass on the question. The *James* Court held only that when a claim is made on a death in Alabama under § 1983, punitive damages must be pled. *James*, 392 F. Supp. at 646. Similarly, *Pollard*, is not on point. The holding in that case was that the state statute of limitations could act as a bar in a § 1983 case. *Pollard*, 384 F. Supp. at 307. There is no statute of limitations issue in the case at bar.

Contrary to Defendant's argument below that the federal district court in *Brown* determined the Alabama Wrongful Death Act should apply in such cases, the Court in *Brown* specifically abstained from offering an opinion on the issue *sub judice*. The *Brown* Court stated:

The court notes that, in instances where a wrongful death action is brought against a municipality under 1983 in Alabama, the result reached in this case, coupled with the recent Supreme Court opinion in *City of Newport v. Fact Concerts, Inc.*, U.S. , 101 S.Ct. 2748, 69 L.Ed.2d 619 (1981) which held that municipalities are immune from punitive damages in civil rights suits under § 1983, bars recovery for wrongful deaths caused by them in Alabama . . . Absent amendment, the court expresses no opinion on how the inconsistency would be remedied in Alabama death cases under 1983.

Brown, 518 F. Supp. at 664, n. 3. Moreover, both *James* and *Pollard* were decided before the decision in *Newport*

v. Fact Concerts, Inc. As such, there was no decision on whether the complete elimination of a § 1983 claim against a municipality would be inconsistent with the Constitution and laws of the United States. The only court to decide the issue in the case at bar, whether the Alabama Wrongful Death Act will be applied when its effect would be to totally eliminate § 1983 claims against municipalities, is *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986). The *Weeks* Court, as stated in the Petition for Certiorari, clearly held that "the strict application of the Alabama statute in such cases would result in the complete immunization of those entities from damages . . . [and] such a result would be inconsistent with the policies underlying § 1983. *Weeks*, 649 F. Supp. at 1305.

C. The Alabama Supreme Court's Decisions In *Carter* And The Present Case Do Not Offer An Adequate Remedy For The Victims Of Official Misconduct.

The opinion of the Alabama Supreme Court in this case, quoting *Carter*, states that the purpose of § 1983 liability is not defeated because the law does recognize an analogous cause of action under the Alabama Wrongful Death Act. This is simply not true.

The Alabama Wrongful Death Act claim in this case is wholly inadequate. It is inadequate because recovery on such state law claims against municipalities in Alabama is capped at \$100,000.00 by Ala. Code § 11-93-2 (1975). Moreover, the state wrongful death claim does not provide any of the other relief afforded successful § 1983 litigants.

In 1997, that is a less than significant remedy on a death claim. This Court in *Carlson* refused to apply an Indiana statute on a death claim in a manner that would have severely restricted the damages available. The Court affirmed the Seventh Circuit Court of Appeals' decision

that "the Indiana law, if applied, would 'subvert' 'the policy of allowing complete vindication of constitutional rights' by making it 'more advantageous for a tortfeasor to kill rather than to injure.'" *Carlson*, 100 S.Ct. at 1468, quoting the lower Court opinion, 581 F.2d at 674. Similarly, Defendant seeks to advance an application of the Alabama Wrongful Death Act that would make it more advantageous for Alabama municipalities to kill than to injure, and would totally eliminate §1983 liability for municipalities that kill in contravention of the civil rights statutes.

The *Carlson* Court did not strictly apply the Indiana statute in a way that would cause the *Bivens* action to be dismissed. Instead, the *Carlson* opinion looked to the federal common law to fashion an appropriate remedy. The lower federal courts have similarly disregarded state law survivorship provisions that would limit § 1983 remedies, and looked to the federal common law to provide a remedy. In *Berry*, *supra*, rather than apply a restrictive state statute, the Court looked to the federal common law to allow the full range of compensatory damages, including medical and burial expenses, pain and suffering before death, loss of earnings, and the victim's loss of consortium. *Berry*, 900 F.2d at 1507. Similarly, the Court in *Linzie v. City of Columbia, Mo.*, 651 F. Supp. 740 (W.D. Mo. 1986) looked to the federal common law to provide for punitive damages in a § 1983 death claim, holding that "Missouri's prohibition against a separate claim for punitive damages would subvert both the compensation and deterrence policies underlying § 1983." *Linzie*, 651 F. Supp. at 743, citing *McFadden*, 710 F.2d at 1241; *See, O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345, 1349 (E.D. Va. 1981) ("Exclusion of a punitive award under the Virginia wrongful death statute is inconsistent with the § 1983 purpose of deterring this sort of conduct . . .").

An analysis of the purposes behind § 1983 actions, pursuant to *Robertson*, leads to the holding in *Carlson* that, when state statutes would abate a federal cause of action, the state statute must give way. In short:

Such restrictive state laws must give way to federal common law rules that permit recovery. In sum, in a section 1983 action, the estate may recover damages for loss of life, conscious pain and suffering experienced by the decedent prior to death, and punitive damages in a case in which the standard . . . has been satisfied

Bass by Lewis, 769 F.2d at 1190, and that:

If state law is inconsistent, it must be disregarded in favor of the federal common law

Id., at 1188, citing *Robertson*, 98 S.Ct. at 1993-95.

The Court in *Guyton v. Phillips*, 532 F. Supp. 1154, 1165 (N.D. Cal. 1981), could "find no cases where a cause of action for deprivation of civil rights did not survive when the actions giving rise to the claim were also the cause or a contributing factor to the death of the decedent." Petitioners have similarly found no such federal case. The Alabama Supreme Court stands alone in its position that the application of a state survivorship provision that totally eliminates a § 1983 claim, leaving the plaintiffs with a severely restricted state wrongful death action, and without the other remedies available to a surviving § 1983 claimant, or a § 1983 claimant in a neighboring state, is not inconsistent with the purposes of underlying § 1983.

Damages restrictions aside, the provision of a parallel state law cause of action in no way replaces the federal right to bring an action for redress of constitutional wrongs under § 1983. In *Monroe v. Pape*, 81 S.Ct. 473 (1961), a police officer against whom a § 1983 action was brought argued that said action was unnecessary because

of a similar state action. The Court rejected this argument, stating:

It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy . . .

Monroe, 81 S.Ct. at 482. As such, even if the state law remedy were not so restrictive, its availability in no way affects whether a separate § 1983 remedy is available.

Similarly, the Court in *Williams, supra*, relying on *Carey v. Piphus*, 435 U.S. 245 (1978), recognized that a state law tort action may not be adequate to remediate a constitutional deprivation. In *Williams*, the issue was whether a California statute cutting off pain and suffering damages at death would be applied to a § 1983 action. In holding such an application to be inconsistent with the Constitution and laws of the United States, the Court held "to deny pain and suffering damages would strike at the very heart of a section 1983 action . . . absent such a remedy, the section 1983 action amounts to little more than a tort claim." *Williams*, 915 F. Supp. at 1077, quoting *Guyton v. Phillips*, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981). Simply put, just as the *Williams* Court found it to be inconsistent not to allow pain and suffering damages in a § 1983 action because of a California limitation on tort actions, the Alabama Supreme Court's decision in this case that totally eliminates § 1983 actions in death cases - leaving litigants with only a capped tort remedy - and is wholly inconsistent with the purposes of a § 1983 action. *See, Carey*, 435 U.S. at 258 (purpose of § 1983 action defeated if injuries caused are uncompensated due to common law restrictions of "analogous" state action).

VIII. CONCLUSION

The Alabama Supreme Court has simply refused to properly apply § 1988 to death actions brought on § 1983 claims against public entities. The Alabama Supreme

Court's application of the Alabama Wrongful Death Act in a way that totally insulates municipalities from § 1983 liability when death results from the constitutional deprivation, rather than from a lesser injury, is manifestly inconsistent with the purposes of underlying a § 1983 action. This Court, as well as numerous lower courts, has held that where a state survivorship provision would severely limit the remedies available to a plaintiff making a federal claim, the Supremacy Clause dictates that the application of state restrictions in § 1983 actions goes only so far as such restrictions do not conflict with federally granted rights and actions. Petitioner merely asks this Court to bring Alabama into line with these decisions, and to put an end to the Alabama Supreme Court's elimination of § 1983 death claims due to state procedural rules which, under the federal decisions cited herein, must yield.

RESPECTFULLY SUBMITTED,



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JUL 16 1997

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

MELVIN JEFFERSON, individually and as the
Administrator of the Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

v.

CITY OF TARRANT, ALABAMA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, Section 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. Section 1983?

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs-appellees below, are the administrator of the estate of Alberta K. Jefferson, who is also one of her sons, and another son and the husband of the decedent. The administrator, Melvin Jefferson, brought claims under the Alabama Wrongful Death Act (Ala. Code § 6-5-410) and 42 U.S.C. § 1983, seeking damages "for the full value of Alberta K. Jefferson's life, and the pain, humiliation, and suffering she endured." J.A. 9, 10-11. The other petitioners, Leon and Benjamin Jefferson, as well as Melvin Jefferson in his individual capacity, brought only state law tort claims. *See id.* 7-8; Pet. Br. 3; Pet. 4.

Respondent, defendant-appellant below, is the City of Tarrant, Alabama, a municipality organized under the laws of the State of Alabama. The City of Tarrant Fire Department and numerous "[f]ictitious" individual parties were also named as defendants. J.A. 4. The Fire Department was dismissed as a defendant, however, because it is an entity of the City of Tarrant that is not capable of being sued in its own capacity. *Id.* 114. No individual defendants are parties to this proceeding because petitioners did not substitute for the fictitious parties named in the complaint any of the actual individuals involved in the alleged wrongdoing, as they were permitted to do under Alabama practice. *See Ala. R. Civ. P. 9(h).*

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---	----

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 96-957

MELVIN JEFFERSON, individually and as the
Administrator of the Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,
v.

CITY OF TARRANT, ALABAMA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Alabama

BRIEF FOR RESPONDENT

INTRODUCTION

This is a Section 1983 action brought by the administrator of the estate of Alberta K. Jefferson in state court to recover damages for injuries suffered by the decedent as a result of an alleged deprivation of the decedent's federal rights. Section 1983—consistent with the common law rule in effect at the time it was enacted—does not supply a remedy for the deceased or her survivors in these circumstances. But Alabama, like each of the other 49 states, has abrogated the common law rule and established such a remedy. Under the Alabama Wrongful Death Act (Ala. Code § 6-5-410), a decedent's estate may commence an action against another for intentionally or negligently causing the decedent's death. The Alabama courts for

more than a century have declared that this action is penal in nature, and thus is redressed through punitive rather than compensatory damages.

In Alabama a decedent's estate may recover punitive damages for wrongful death against both individuals *and* municipalities. Under Section 1983, by contrast, punitive damages are recoverable against individuals but not municipalities. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Applying the *Fact Concerts* rule, the Alabama courts have held that in a Section 1983 action, such as this, in which Alabama law is invoked to recover damages for wrongful death, a decedent's estate may not recover punitive damages against a municipal—as opposed to individual—defendant. Because compensatory damages are not available for wrongful death under Alabama law, the *Fact Concerts* rule has the effect of barring recovery against a municipality for injuries to a decedent, except for nominal damages.

The question presented is whether the Alabama Wrongful Death Act governs the recovery available under Section 1983 to a decedent's estate in these circumstances. 117 S. Ct. 1333. The answer is—yes. Congress has not established a survival or wrongful death scheme for Section 1983.¹ It has, however, instructed that when federal

¹ Generally speaking, “[s]urvival statutes permit the deceased's estate to prosecute any claims for personal injury the *deceased* would have had, but for his death. They do not permit recovery for harms suffered by the deceased's family as a result of his death.” *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 575 n.2 (1974) (emphasis in original). Wrongful death statutes, on the other hand, typically create a cause of action in favor of the deceased's survivors—“beyond which the decedent had”—for the survivor's injuries resulting from the deceased's death, such as loss of consortium or the like. *Id.* at 578 n.5. As explained below, because the personal representative in this case seeks damages under the Alabama statute and Section 1983 for injuries suffered by his decedent (*i.e.*, Mrs. Jefferson), not her survivors, the representative's Section 1983 claims are better characterized as survival rather than wrongful death claims.

law is not adapted to a particular object under Section 1983, courts should apply the common law as modified by statutes of the forum state, unless that law is “inconsistent” with federal law. 42 U.S.C. § 1988(a). As we explain, the Alabama Wrongful Death Act is not inconsistent with federal law—including either the general compensatory or deterrence aims of Section 1983—and thus, pursuant to Section 1988, that Act governs the recovery available to a decedent's estate under Section 1983.

This result limits the recovery to the decedent's estate on the particular Section 1983 claims pleaded here. But, as Justice Marshall wrote for the Court in *Robertson v. Wegmann*, 436 U.S. 584, 593 (1980), “[a] state statute cannot be considered ‘inconsistent’ with federal law merely because the statute causes the plaintiff to lose the litigation.” Mrs. Jefferson's estate, moreover, has failed fully to avail itself of the remedies available to it under Section 1983 and Alabama law. Unlike the state survival statute challenged in *Robertson*, the Alabama statute—even when coupled with *Fact Concerts*—does not deny a decedent's estate any avenue of redress under Section 1983, but instead limits the recovery available against municipal defendants. Under the Alabama law a decedent's estate may seek substantial damages for wrongful death under Section 1983 from individual wrongdoers. Mrs. Jefferson's estate, however, simply elected not to press such claims.

There is nothing inherently unfair or discriminatory about this result, or Alabama's decision to redress wrongful killings through punitive damages in the first place. The Alabama Wrongful Death Act was adopted long before this Court decided *Fact Concerts*, and it is undisputed that the statute's remedial scheme was *not* motivated by any discriminatory intent. Indeed, the overriding purpose of the Alabama scheme is to prevent wrongful killings. This Court itself, moreover, has declared that punitive damages “are especially appropriate to redress the violation by a Government official of a citizen's constitu-

tional rights." *Carlson v. Green*, 446 U.S. 14, 22 (1980). In any event, because Section 1988 directs that the Alabama statute be applied to survival or wrongful death actions brought in Alabama pursuant to Section 1983, petitioners' objections to the recovery available in these circumstances should be directed to Congress, not this Court.

JURISDICTION

As an initial matter, it must be noted that this Court lacks jurisdiction to review the interlocutory order of the Alabama Supreme Court in this case. This Court's review of state court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). It is apparent from the face of the Alabama Supreme Court's decision that it did not render a "final judgment." The last sentence of the court's opinion concludes "the cause is remanded for further proceedings consistent with this opinion," followed by the directive "Reversed and Remanded." J.A. 121. There are indeed further proceedings yet to come in the case: the issue decided by the Alabama Supreme Court concerned only Counts III and IV of petitioners' complaint; the state wrongful death count was unaffected and remains for trial. *See id.* 7-10.²

There can be no dispute about the interlocutory nature of the decision below. Indeed, the case only reached the Alabama Supreme Court because it was certified pursuant to Alabama Rule of Appellate Procedure 5, authorizing review of certain interlocutory orders. *See J.A. 115; Ala. R. App. P. 5(a)*. Since the issue of this Court's jurisdiction turns on the construction of 28 U.S.C. § 1257(a), whether a ruling is a final judgment under that provision is a question of federal, not state law. *See Department of*

² Subsequent to the Alabama Supreme Court's decision, the trial court on remand granted partial summary judgment in favor of the City on Count II. *See J.A. 114; Opp. 3*. Count I—the state wrongful death claim—remains for trial.

Banking v. Pink, 317 U.S. 264, 268 (1942); *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946). The decision of the Alabama Supreme Court to review the federal issue in an interlocutory posture thus can have no effect on whether its ruling is final for purposes of Section 1257(a). *See, e.g., Flynt v. Ohio*, 451 U.S. 619 (1981) (dismissing writ of certiorari for want of jurisdiction due to lack of finality despite decision of state supreme court to review intermediate court decision remanding case for trial).

The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). To be final and reviewable, a state court decision "must * * * be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street Ry. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). The Court has expressly held that the judgment "should be final not only as to all the parties, but as to the whole subject-matter and *as to all the causes of action involved*." *Collins v. Miller*, 252 U.S. 364, 370 (1920) (emphasis added). The decision below—remanding for trial on remaining counts—plainly does not meet this standard. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 72 (1987) ("Over the years the Court has consistently applied a strict test of finality to determine the reviewability of state-court decisions remanding cases for further proceedings") (Stevens, J., dissenting).

Nor does the decision below fall within any of the four categories of cases in which the Court has treated state-court judgments as final even though further proceedings were to take place in state court. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-485 (1975).³ The

³ *Cox* holds that the finality requirement may be satisfied despite the pendency of further proceedings when (1) "there are further

first, third, and fourth *Cox* categories are plainly inapplicable. The second category involves cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. This case does not fit into that category because resolution at trial of Count I—the state wrongful death claim—could well affect the survival of the federal issue, given the overlap between the factual predicates for Count I and the Section 1983 counts.

A determination under Count I that Mrs. Jefferson's death was *not* "caused by the intentional, negligent, wanton, careless and unskilled actions and inactions" of the City, J.A. 7, for example, would preclude any recovery under Section 1983, so that the federal issue of the availability of relief under that section would not "survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. *See Migra v. Warren City Sch. Dist.*, 465 U.S. 75 (1984) (litigation of state court claims preclusive in subsequent Section 1983 action); *George v. White*, 837 F.2d 1516 (11th Cir. 1988) (same; applying Alabama preclusion law).⁴

proceedings * * * yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained," (2) "the federal issue * * * will survive and require decision regardless of the outcome of future state-court proceedings," (3) "the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case," or (4) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, * * * and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." 420 U.S. at 479-483.

⁴ The fact that the federal issue may or may not survive the proceedings on remand distinguishes this case from *Pennsylvania*

The foregoing is confirmed by *O'Dell v. Espinoza*, 456 U.S. 430 (1982). In that case, the Court granted certiorari to consider whether a surviving child may assert a Section 1983 claim for the wrongful death of a parent. After argument, however, the Court unanimously dismissed the writ as improvidently granted, holding that because the state supreme court "remanded this case for trial, its decision is not final 'as an effective determination of the litigation.'" *Id.* at 430 (quoting *Market Street Ry.*, 324 U.S. at 551). The Court specifically noted that "there is a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts," *id.* (citing *Cox, supra*), but that "this case does not fit into any of those categories." *Id.*

This case is indistinguishable from *O'Dell* and, as in that case, the writ should be dismissed as improvidently granted.⁵

STATEMENT OF THE CASE

On June 21, 1994, petitioner Melvin Jefferson, administrator of the estate of his mother, Alberta K. Jefferson, filed suit in the Circuit Court of Jefferson County, Alabama, against the respondent City of Tarrant, Alabama, the City of Tarrant Fire Department, and numerous "[f]ic-

v. Ritchie, supra. Due to the "unusual facts" of *Ritchie*, the federal issue would not have survived the remand regardless of the outcome. 480 U.S. at 47-49 & n.7. Here, by contrast, whether the federal claim will survive depends on the result of the proceedings on remand—which is precisely why the decision is not final and not within any of the *Cox* exceptions.

⁵ Respondent's brief in opposition noted that the decision below was interlocutory, that the Alabama Supreme Court "remanded the case," and that Count I of petitioners' complaint remained for trial. *See Opp. 2, 3*. The opposition did not, however, expressly assert lack of jurisdiction for want of finality, arguing instead that the federal questions were not properly raised below. *See Sup. Ct. R. 15.2*.

titious * * * agents and/or employees" of these government entities, alleging that these defendants had wrongfully caused the death of Mrs. Jefferson. J.A. 3-5.⁶ Mrs. Jefferson's other son and husband joined as plaintiffs, but asserted only state law claims for infliction of emotional distress. *Id.* 3, 7; Pet. Br. 3; Pet. 4. The complaint alleged that Mrs. Jefferson died during a dwelling fire, and that the Fire Department and fictitious individuals wrongfully failed to rescue or revive her. *See* J.A. 5.⁷

The complaint raised both state and federal claims. Counts I and II sought relief under the Alabama Wrongful

⁶ Under Alabama practice a plaintiff may plead claims against "fictitious parties" if he is "ignorant of the name of the opposing party," and later amend the pleadings to substitute the name of the actual party. Ala. R. Civ. P. 9(h). *See Cooper v. Thomas*, 456 So.2d 280 (Ala. 1984). Petitioners, however, have not sought to amend their complaint to substitute the names of any actual individuals involved in the alleged wrongdoing; thus, there are no actual individual defendants in this case.

⁷ Petitioners have alleged "that a pattern and custom of denying protective services to disfavored minorities exists in the City of Tarrant, Alabama, and led to the death of Mrs. Jefferson." Pet. Br. 3. *See* J.A. 6. While, for purposes of defending the interlocutory order below, the City treats the allegations as true, the evidence adduced to date shows the following:

Mrs. Jefferson died on December 4, 1993. The City of Tarrant Fire Department received a call at about 9:45 p.m. that evening, informing it that Mrs. Jefferson's residence—a one-story wood frame building—was in flames. Fire Department personnel arrived on the scene at about 9:49 p.m.—less than five minutes after they received the call. Mrs. Jefferson was pulled from the fire by rescue personnel and pronounced dead at 9:50 p.m. It was later determined that she had died from smoke inhalation at about 9:40 p.m., before any call was placed to the Fire Department. *See* J.A. 30, 45.

To support the claim of discriminatory treatment, petitioners rely principally on the affidavit of Ida Bell Pugh, which states that during a 1992 fire, the Fire Department "made no attempt to put out the fire quickly." R. 221. Mrs. Pugh's affidavit contains no indication of her race. When asked under oath whether they knew of any facts showing that Mrs. Jefferson was denied fire protection on account of her race, both Benjamin and Melvin Jefferson replied in the negative. *See* J.A. 38-41.

Death Act (Ala. Code § 6-5-410) and the state law tort of infliction of emotional distress, respectively. J.A. 7-8. Count III sought relief under 42 U.S.C. § 1983 for alleged deprivation of Mrs. Jefferson's life in violation of her rights under the Fourteenth Amendment, and Count IV sought relief under 42 U.S.C. § 1983 for alleged denial of Mrs. Jefferson's right to equal protection in violation of the same amendment. J.A. 8-10. The Section 1983 counts sought "compensatory and punitive damages * * * for the full value of Alberta K. Jefferson's life, and the pain, humiliation, and suffering she endured." J.A. 9, 10-11. The complaint thus sought damages only on the basis of injury to the decedent, not to any survivors.⁸

The City denied the allegations, J.A. 17-24, and moved for judgment on the pleadings as to the two Section 1983 counts. J.A. 88-90.⁹ The City's motion explained that Section 1983 does not address whether a cause of action for personal injuries to a decedent survives her death, but that, pursuant to 42 U.S.C. § 1988, this question was governed by applicable state law. Section 1988 provides that Section 1983 actions are governed by "the laws of the United States,"

but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal

⁸ Indeed, none of petitioners has asserted wrongful death claims under Section 1983 for injuries to themselves resulting from Mrs. Jefferson's death. To the extent they seek damages for personal injuries, petitioners' claims are confined to Count II—the state law infliction of emotional distress claim. *See* J.A. 7, 9, 10-11; Pet. Br. 3; Pet. 4.

⁹ The City also moved to dismiss the Fire Department as a defendant on the ground that it is an entity of the City of Tarrant that is not capable of being sued in its own capacity. The trial court granted that motion. J.A. 114.

cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause * * *. [42 U.S.C. § 1988(a).]

Although the common law barred civil actions seeking damages for wrongs resulting in death—whether through survival of claims the decedent would have had but for her death, or through the claims of survivors for their own injuries as a result of the decedent's death—that rule was abrogated by statute in Alabama nearly 150 years ago. Under the Alabama Wrongful Death Act,

[a] personal representative may commence an action and recover such damages as the jury may assess * * * for the wrongful act, omission or negligence of any person, persons or corporation, * * * whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence if it had not caused death. [Ala. Code § 6-5-410(a).]¹⁰

The purpose of this provision is to punish wrongdoers in order to discourage the tortious infliction of death, and

¹⁰ This provision is the modern day successor to "An Act to Prevent Homicides," which was enacted by the Alabama legislature in 1872. The 1872 Act modified the first such statute passed in Alabama in 1852, which was virtually identical to Lord Campbell's Act, 9 & 10 Vict., ch. 93 (1846). See Charles W. Gamble, *Alabama Law of Damages* § 37-2 at 542 (3d ed. 1994). In addition to Section 6-5-410, Alabama has established separate causes of action in favor of parents governing the wrongful death of a minor, Ala. Code § 6-5-391, and in favor of representatives for injuries to a decedent's property resulting from a wrongful act causing death. *Id.* § 6-5-411. In addition, Alabama law provides for the survival of any personal injury or other claims pending at the time of a decedent's death. See *id.* §§ 6-5-462 to -464; Gamble, *supra* § 37-3 at 543. See generally Comment, *Surviving the Death of a Party: Alabama's Survival Statutes*, 22 Cumb. L. Rev. 711 (1992).

thus preserve human life. See *Geohagen v. General Motors Corp.*, 279 So.2d 436, 439 (Ala. 1973) (Alabama statute "intended to protect human life, to prevent homicide, and to impose civil punishment on takers of life"); *Alabama Great S.R.R. v. Burgess*, 22 So. 913 (Ala. 1897) (same); cases cited *infra* at 35. Accordingly, liability under the Alabama wrongful death statute is—and for more than a century has been—assessed in the form of punitive rather than compensatory damages, based on the degree of culpability of the wrongdoer. See Gamble, *supra* § 37-9 at 549; J.A. 119-120.¹¹

As the City's motion for judgment on the pleadings noted, this Court in *City of Newport v. Fact Concerts, Inc.*, *supra*, ruled that under federal law punitive damages are not available against a municipality in an action

¹¹ The availability of punitive damages for wrongful death is more generous than it is for all other torts in Alabama. To obtain punitive damages in any action *other than* wrongful death, a plaintiff must "prove[] by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff." Ala. Code § 6-11-20. In wrongful death actions, however, a plaintiff not only is not held to the clear-and-convincing-evidence standard, but may recover punitive damages for mere negligence. *Id.* § 6-5-410(a). See Gamble, *supra* § 37-3 at 543 n.4. See, e.g., *Black Belt Wood Co. v. Sessions*, 514 So.2d 1249 (Ala. 1987) (upholding \$3.5 million wrongful death award to estate of motorist killed by log falling from passing truck).

Alabama law limits to \$100,000 the recovery of damages—in any action—against a municipality or other government entity for death or bodily injury. Ala. Code § 11-93-2. This cap applies to suits brought against individual officers or employees of municipalities for damages arising from *negligent* misconduct, for which such individuals are indemnified pursuant to Alabama law. See *Benson v. City of Birmingham*, 659 So.2d 82 (Ala. 1995). The cap does not, however, apply to suits brought against such individuals "for damages arising out of actions which were either *intentional or willful or wanton*," for which such individuals are not indemnified. Ala. Code § 11-47-24(a) (emphasis added). See note 29, *infra*.

brought under Section 1983. J.A. 89. Thus, because a personal representative may not recover compensatory damages under the Alabama Wrongful Death Act, and because punitive damages are not available against a municipality under federal law, the City argued in its motion that Mrs. Jefferson's administrator was not entitled to recover against it—as opposed to any individual wrongdoers—either compensatory or punitive damages in a Section 1983 action for wrongful death. *Id.* In other words, the City's motion argued, "Mrs. Jefferson's claim for compensatory damages under § 1983 did not survive [her death]." *Id.*

The Alabama Circuit Court granted judgment on the pleadings on the Section 1983 counts as to punitive damages, but denied such relief as to compensatory damages. J.A. 108. The court certified its order for interlocutory appeal to the Alabama Supreme Court, which agreed to review the non-final decision to consider "[w]hether the survival of Alberta K. Jefferson's claim for compensatory damages under 42 U.S.C. § 1983 is governed by federal common law or by reference to the Alabama wrongful death statute." J.A. 109-110, 115-116. The Alabama Supreme Court reversed, holding that the Alabama statute, not federal common law, governed the decedent's claim for compensatory damages and barred recovery of such damages. *Id.* 121.

Relying on its decision in *Carter v. City of Birmingham*, 444 So.2d 373 (Ala. 1983), *cert. denied*, 467 U.S. 1211 (1984), the Alabama Supreme Court rejected the argument that application of the Alabama Wrongful Death Act was inconsistent with federal law. In *Carter* the court explained that the Alabama statute was consistent with Section 1983's policies of deterrence and compensation. The state regime promoted deterrence because a "tortfeasor who caused death by his actions would, if found liable * * *, face a punitive damage award designed to punish him for his wrongful act." *Id.* at 376 (internal quotation marks omitted). And the state law focus on

punitive damages did not conflict with Section 1983's compensation policy, because "where the injured party is deceased, any damage award would not compensate *him* for his injuries, because the cruel fact is he is no longer present to benefit from any damages awarded." *Id.* (internal quotation marks omitted; emphasis in original). As the *Carter* court explained, this Court in *Robertson v. Wegmann*, *supra*, reached the same conclusion in similar circumstances. 444 So.2d at 376-377.

The Alabama Supreme Court remanded for further proceedings on petitioners' remaining state law claims. *See* J.A. 117-121. Prior to any proceedings on remand, however, this Court granted certiorari on the modified question set forth on page i above.

SUMMARY OF ARGUMENT

The question whether the Alabama Wrongful Death Act governs the recovery by a decedent's estate under Section 1983 turns on application of Section 1988 of the Civil Rights Acts. That provision directs courts to apply federal law whenever it is adapted to the particular object at hand, but when federal law is silent or deficient with respect to Section 1983, to apply the common law as modified by the statutes of the forum state, unless that law is "inconsistent" with federal law. 42 U.S.C. § 1988(a). This Court has admonished that Section 1988's borrowing provision is "more than a mere technical obstacle to be circumvented if possible." *Burnett v. Gratton*, 468 U.S. 42, 60 (1984) (internal quotation marks omitted). Section 1988 embodies a congressional determination that state law, not federal common law, provides the most suitable source of law for rounding out Section 1983's remedial scheme.

As this Court recognized in *Robertson v. Wegmann*, 436 U.S. at 589, federal law is not adapted to the object of recovery for injuries to a decedent under Section 1983. Section 1983—in accordance with the common law rule

at the time it was enacted—does not by its terms contain a survival or wrongful death provision. That omission is telling, for Congress appreciated the fact that there was no recovery for wrongful death at common law, and knew how to provide for a departure from that rule when it wanted to do so, as it did in Section 1986 of the Civil Rights Acts, enacted at the same time as Section 1983.

Because federal law is not adapted to the object of survival or wrongful death, Section 1988 instructs that the Alabama Wrongful Death Act—which abrogates the common law rule barring recovery for death—must be applied in Section 1983 actions brought in that state, unless it is inconsistent with federal law. There certainly is no express inconsistency between the Alabama statute and federal law; as noted, federal law does not address the right of a decedent's estate to bring a survival or wrongful death action under Section 1983, although it does establish a wrongful death remedy for *other* violations of the Civil Rights Acts. That the Alabama statute does not supply a wrongful death remedy in the particular circumstances of this case cannot possibly be deemed inconsistent with federal law, when the 42d Congress plainly knew how to create such a remedy but chose not to do so in the case of Section 1983.

Nor is there any reason to imply an inconsistency based on the general policies of Section 1983, which include compensating those injured by a deprivation of federal rights and deterring such violations in the future. As Justice Marshall wrote for the Court in *Robertson v. Wegmann*, 436 U.S. at 592 (emphasis added), “[t]he goal of compensating *those injured* by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate.” This case presents no occasion for the Court to consider whether Section 1983 requires compensation of survivors for their own injuries, because the administrator here seeks damages only for injuries to the decedent. As for deterrence, that is the emphatic purpose of the Alabama Wrong-

ful Death Act. Moreover, as this Court observed in *Robertson*, it is “far-fetched” to suggest that a state actor, even one that has taken upon itself to learn the intricacies of a state wrongful death or survival scheme, “would * * * be influenced in its behavior by its provisions.” *Id.* at 592, 593 n.10.

At bottom, petitioners' position is that the Alabama Wrongful Death Act must be inconsistent with federal law because, given the interplay between *Fact Concerts* and the Alabama damages scheme, a decedent's estate is denied recovery under Section 1983 against municipal defendants. This Court squarely rejected such a result-oriented approach to the Section 1988 “consistency” analysis in *Robertson*, stating that “[a] state statute cannot be considered ‘inconsistent’ with federal law merely because the statute causes the plaintiff to lose the litigation.” 436 U.S. at 593. Moreover, petitioners here—unlike the plaintiff in *Robertson*—are not denied any avenue of redress under federal law. They may bring substantial Section 1983 damages claims for wrongful death under the Alabama statute against the individuals involved in the alleged wrongdoing, but have of their own volition elected not to press such claims.

Because application of the Alabama statute to Section 1983 claims is not inconsistent with federal law, Section 1988 directs that the statute governs the recovery by a decedent's estate under Section 1983. This case accordingly presents no occasion for the Court to undertake to fashion a federal common law survival or wrongful death regime for Section 1983, and petitioners' objection to the recovery available under Section 1983 should be directed to Congress, not this Court. Congress has acted to expand the recovery available in wrongful death actions brought in Alabama under the Federal Tort Claims Act, where a similar problem arose due to the intersection between applicable federal and state damages rules. There is no reason to presume that Congress will not act in a similar

fashion if it determines that the wrongful death remedy available to Alabama plaintiffs is inadequate under Section 1983.

ARGUMENT

The question framed by this Court arises because Congress has not addressed the availability of survival or wrongful death claims under Section 1983. Congress has, however, supplied the methodology for resolving this question in 42 U.S.C. § 1988(a). *First*, courts are to look to “the laws of the United States, so far as such laws are suitable to carry [the Civil Rights Acts] into effect.” *Id.* *Second*, if those laws “are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law,” courts are to look to “the common law, as modified and changed by the constitution and statutes” of the forum state. *Id.* *Third*, courts are to apply this state law “so far as [it] is not inconsistent with the Constitution and laws of the United States.” *Id.* *Accord Burnett v. Grutton*, 468 U.S. at 60.

Both this Court and the lower courts have invoked Section 1988 to determine the remedies available to decedents or their survivors under Section 1983. *See, e.g.*, *Robertson v. Wegmann*, 436 U.S. at 588-589; *Moor v. County of Alameda*, 411 U.S. 693, 702 n.14 (1973) (citing *Brazier v. Cherry*, 293 F.2d 401, 407-409 (5th Cir.) (involving both wrongful death and survival claims), *cert. denied*, 368 U.S. 921 (1961)); *Jones v. Hildebrant*, 550 P.2d 339, 343-344 nn.4 & 5 (Colo. 1976) (citing additional cases), *cert. dismissed as improvidently granted*, 432 U.S. 183 (1977). The Alabama Supreme Court below invoked Section 1988, J.A. 119, and the parties agree that Section 1988 governs this case. *See Pet. Br.* 4-5, 7. As explained below, Section 1988 directs that the Alabama Wrongful Death Act be applied to govern the recovery by a decedent’s estate under Section 1983.¹²

¹² Section 1988 is by its terms addressed to “proceeding[s]” and “remedies” available in actions brought in federal “district courts.”

I. FEDERAL LAW IS NOT ADAPTED TO THE OBJECT OF RECOVERY BY A DECEDENT'S ESTATE UNDER SECTION 1983 FOR INJURIES TO A DECEDENT.

1. Before determining whether federal law is adapted to the particular object in question, it is necessary to understand the nature of the Section 1983 claims asserted. The Section 1983 counts pleaded by the decedent’s estate in this case seek damages for injuries to a decedent, not to any survivors. *See note 8, supra.* As a result, they are in common parlance better regarded as survival rather than wrongful death claims. *See Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. at 575 n.2, 578 n.5 (survival laws permit “the deceased’s estate to prosecute any claims for

42 U.S.C. § 1988(a). For at least two reasons, however, the Alabama Supreme Court properly looked to Section 1988 in this state court proceeding. First, Section 1988’s focus on federal court proceedings is most likely explained by the fact that, when Section 1988 was first enacted in 1866, it was part of a provision (§ 3 of the Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27) establishing *exclusive* federal jurisdiction over enforcement of the Civil Rights Acts. *See Moor*, 411 U.S. at 704-705 & n.18. By the time Congress enacted Section 1983 (in 1871), § 3 of the 1866 Act had been amended to make federal jurisdiction over proceedings brought under the Civil Rights Acts concurrent with that of the states; the pertinent text of what is now Section 1988, however, simply was never changed to reflect that civil rights actions may be brought in state court, too. Second, construing Section 1988 to apply only to federal court proceedings could subject Section 1983 actions to different rules depending on whether the action is brought in federal or state court, contravening the settled principle that “the outcome of * * * litigation in * * * federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.” *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). In any event, if Section 1988 does not apply to state court proceedings, the preemption analysis set forth in *Felder v. Casey*, 487 U.S. 131 (1988) would apply, and, for the reasons explained in Part II, *infra*, the *Felder* preemption analysis—which focuses on whether the state rule “is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law,” *id.* at 153, and thus tracks the Section 1988 analysis—should produce the same result as Section 1988.

personal injury the *deceased* would have had, but for his death," whereas wrongful death laws create a cause of action in favor of the decedent's survivors for their own injuries resulting from the decedent's death, such as for loss of consortium) (emphasis in original); Charles T. McCormick, *Law of Damages* § 93 at 335-337 (1935) (same); note 1, *supra*. The Alabama Supreme Court below accordingly certified and decided only the "question of the *survivability* of Alberta K. Jefferson's cause of action for compensatory damages under 42 U.S.C. § 1983." J.A. 118 (emphasis added). *Accord id.* 109.¹³

This Court has previously held that federal law does not address the survival of Section 1983 claims, *see Robertson v. Wegmann*, 436 U.S. at 589 ("one specific area not covered by federal law is that relating to 'the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant'") (quoting *Moor*, 411 U.S. at 702 n.14), and petitioners candidly concede the point. *See Pet. Br.* 7 ("The issue in this case arises out of the lack of a survival provision in § 1983."); *accord Pet. i*, 5. Thus, there is no question here that federal law is "not adapted to the object," or is "deficient," 42 U.S.C. § 1988(a), with respect to the damages available to a decedent's estate under Section 1983 for injuries to a decedent, and that the inquiry accordingly must proceed to the second step of the Section 1988 analysis.

2. In any event, to the extent the Section 1983 counts in this case may also, or alternatively, be regarded as presenting wrongful death claims, federal law plainly does not address the viability of such claims under Section 1983

¹³ In this regard, the popular name of the Alabama statute at issue in this case—the Alabama Wrongful Death Act—is something of a misnomer. Indeed, petitioners themselves have characterized that statute as a "survivorship provision." Pet. i. ("In a case brought in Alabama, the survivorship provision that becomes operative pursuant to § 1988 is the Alabama Wrongful Death Act, Ala. Code § 6-5-410 (1975).").

either.¹⁴ This Court has already rejected the notion that the Constitution supplies any right to bring a wrongful death action, *see Parkam v. Hughes*, 441 U.S. 347, 358 n.12 (1979) ("It cannot seriously be argued" that there is a constitutional right "to sue for the wrongful death of another."), and petitioners here do not suggest otherwise. Nor can Section 1983, or any other provision of federal law applicable to Section 1983, be construed to create such a cause of action.

a. Section 1983 provides that anyone acting under color of state law who deprives another of a federal right¹⁵ shall be liable "to the party injured." 42 U.S.C. § 1983. This language confers a remedy on the person injured due to the deprivation of *her* federal rights; it does not, however, confer a remedy on a third party based upon the deprivation of *someone else's* rights, which, as noted, is the essence of a wrongful death action. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("By the plain terms of § 1983 * * * to state a cause of action under that statute * * * the plaintiff must allege that some person has deprived *him* of a federal right") (emphasis added); *Hall v. Wooten*, 506 F.2d 564, 566 (6th Cir. 1974) ("[O]ne may not sue [under Section 1983] for the depriva-

¹⁴ Although Section 1983 wrongful death cases have reached this Court, *see City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Scheuer v. Rhodes*, 416 U.S. 232 (1974), in none of those cases did the Court address the question presented here. In *Jones v. Hildebrant*, 432 U.S. 183, 185 (1977), the Court granted certiorari to consider "whether a State's limitation on damages in a wrongful death statute would control in an action brought pursuant to § 1983," but dismissed the writ as improvidently granted.

¹⁵ It is well established that Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). *Accord Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality); *Graham v. Connor*, 490 U.S. 386, 393-394 (1989); *Tuttle*, 471 U.S. at 816.

tion of another's civil rights"). *See also* William H. Theis, *Shaw v. Garrison: Some Observations On 42 U.S.C. § 1988 And Federal Common Law*, 36 La. L. Rev. 681, 690 (1976).¹⁶

b. That Section 1983 supplies no wrongful death remedy is underscored by 42 U.S.C. § 1986. Originally enacted along with Section 1983 as part of the Civil Rights Act of 1871, *see* Act of Apr. 20, 1871, ch. 22, § 6, 17 Stat. 13; *Monroe v. Pape*, 365 U.S. 167, 189-190 (1961); *Monell v. New York Dep't of Social Services*, 436 U.S. 658, 666 (1978), Section 1986 creates a remedy against persons who are aware of, and have the power to prevent, conspiracies prohibited by 42 U.S.C. § 1985, but neglect or refuse to do so. Unlike any other provision of the Civil Rights Acts (including Section 1983), Section 1986 explicitly establishes a wrongful death remedy, providing:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; * * * and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding \$5,000 damages therein, for the benefit of the widow of the de-

¹⁶ Petitioners have alleged no violation of their own constitutional rights, only the decedent's. *See* J.A. 8-10. Nor have they alleged an unconstitutional interference with their familial relationship with the decedent. *Cf. Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 563 (1st Cir.) ("a parent cannot maintain a claim for loss of familial association under 42 U.S.C. § 1983 unless the government action in question is directly aimed at the relationship between a parent and young child") (Breyer, J.), *cert. denied*, 488 U.S. 823 (1988).

ceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. [42 U.S.C. § 1986 (emphasis added).]

The absence of any comparable provision governing the contemporaneously enacted Section 1983 is compelling evidence that the 42d Congress did not intend to create a wrongful death remedy for Section 1983. *See City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another") (internal quotation marks omitted); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted); *cf. Burnett v. Grattan*, 468 U.S. at 48 (concluding that courts must look beyond Section 1983 for the limitations period applicable to that statute and observing that "[o]nly 42 U.S.C. § 1986 contains a statute of limitations"). Indeed, Section 1986 confirms that Congress knew how to create a wrongful death or survival provision when it wanted to, but simply declined to do so for Section 1983.¹⁷

¹⁷ When Congress enacted wrongful death statutes in the early and mid twentieth century, it also did so in express language. *See* National Parks Act, 16 U.S.C. § 457; Federal Tort Claims Act, 28 U.S.C. § 2674; Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51; Jones Act, 46 U.S.C. App. § 688(a); Death On The High Seas Act, 46 U.S.C. App. § 761. For example, FELA—which was first enacted in 1908, *see* Act of Apr. 22, 1908, ch. 149, § 1, 35 Stat. 65—provides that railroad common carriers "shall be liable in damages to any person suffering injury while he is employed by such carrier in [interstate] commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of" his or her survivors, where the railroad's negligence caused the death or injury. 45 U.S.C. § 51. These statutes provide still further evidence that Congress did not—and has not—created any wrongful death or survival provision for Section 1983.

c. The legislative history of Section 1983 does not compel any different conclusion. The debates over the Civil Rights Act of 1871 do contain references to killings. In what is perhaps the most frequently quoted passage, *see, e.g.*, *Wilson v. Garcia*, 471 U.S. 261, 276 (1985), Representative Lowe stated: "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective." *Cong. Globe*, 42d Cong., 1st Sess. 374 (1871). That the 42d Congress was concerned about "the alarming insecurity of life, liberty, and property in the Southern States," *Wilson v. Garcia*, 471 U.S. at 276, however, does not mean that it intended to make Section 1983 a vehicle for wrongful death or survival claims, in derogation of the common law.

Indeed, none of the comments on which petitioners rely—plucked from volumes of transcripts of extraordinarily emotional floor debates—are tied to references to Section 1983 and, in fact, were most likely addressed toward Section 1985.¹⁸ Any remarks addressed to Section 1985, of course, say little, if anything, about Section 1983. And general remarks such as Representative Lowe's, untethered to any specific section of the Civil Rights Acts, are plainly insufficient to override the conclusion that follows from the *text* of those Acts, and, in particular, Sections 1983 and 1986. *See Shannon v. United States*, 512 U.S. 573, 583-584 (1994) (refusing to give weight to legislative history "in no way anchored in the text of the statute" since "[c]ourts have no authority to enforce [a] principle[s] gleaned solely from legislative history that has no statutory reference point") (internal quotation marks omitted).

¹⁸ It appears that Representative Lowe himself had Section 1985 in mind when he warned that "murder is stalking abroad in disguise." *See* 42 U.S.C. § 1985(3) ("If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another") (emphasis added).

At the same time, the fact that Section 1983 does not supply a wrongful death or survival remedy does not mean that the 42d Congress' concern about murder received no legislative expression, or that there is no redress for such acts. First, even if one who committed murder in violation of the civil rights laws could have escaped federal civil liability, such conduct would plainly subject the perpetrator to possible criminal prosecution. *See Screws v. United States*, 325 U.S. 91 (1945). Second, through Section 1986 of the Civil Rights Acts, Congress *did* provide a wrongful death remedy for certain violations, including violations of Section 1985, to which Representative Lowe's remarks were most likely addressed. *See* note 18, *supra*. And third, Congress ensured through Section 1988 that plaintiffs would be able to take advantage of state wrongful death or survival laws—including Alabama's—permitting certain actions on behalf of the deceased or their survivors.

3. "It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum." *Fact Concerts*, 453 U.S. at 258. Thus, in construing Section 1983, this Court assumes "that members of the 42d Congress were familiar with common-law principles * * * and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Id.* *Accord Carey v. Piphus*, 435 U.S. 247, 255 (1978). Accordingly, where a doctrine "was well established at common law by 1871, [this Court] proceed[s] on the familiar assumption that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Fact Concerts*, 453 U.S. at 263 (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)). *Accord Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993); *Burns v. Reed*, 500 U.S. 478, 497 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).¹⁹

¹⁹ This Court's historical approach to the construction of Section 1983 coheres with the rule that "[s]tatutes which invade the com-

As this Court recently reiterated, the “common law in the United States, like the common law of England, did not allow recovery for an injury which results in death.” *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 624 (1996) (internal quotation marks omitted). *See also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 379-396 (1970); *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 344-346 (1937); *Insurance Co. v. Brame*, 95 U.S. 754, 756-757 (1877). Thus, as Justice Harlan explained, “[a]t common law, no person had a legally cognizable interest in the wrongful death of another person, and no person could inherit the personal right of another to recover for tortious injuries to his body.” *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 76 (1968) (dissenting). *See generally* Francis B. Tiffany, *Death By Wrongful Act* (2d ed. 1913); T.A. Smedley, *Wrongful Death—Bases of the Common Law Rule*, 13 Vand. L.J. 605 (1960); W.S. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. Rev. 431 (1916).²⁰

mon law * * * are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.” *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). *Accord Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991). “In order to abrogate a common-law principle, the statute must ‘speak directly’ to the question addressed by the common law.” *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). *See Tome v. United States*, 513 U.S. 150, 163 (1995) (“A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.”) (internal quotation marks omitted).

²⁰ The common law rule barring recovery for death consists of two distinct doctrines. *See Tiffany, supra* § 1 at 1-3; Smedley, *supra*, at 605. First, pursuant to the maxim *actio personalis moritur cum persona*—personal actions die with the person—a cause of action to redress an injury abated upon the death of the injured party or the tortfeasor. *See, e.g., Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 67 (1913) (“Nothing is better settled than that at common law the right of action for an injury to the person is extinguished by the death of the party injured”). Under the second doctrine,

There can be no question that in 1871—the year in which Section 1983 was enacted—the common law provided no civil remedy for a decedent or his survivors for wrongful death. *See, e.g., Georgia R.R. & Banking Co. v. Wynn*, 42 Ga. 331, 334 (1871) (calling *Baker v. Bolton* “the rule of the common law”). Indeed, in 1877—just six years after Section 1983 was adopted—this Court in *Insurance Co. v. Brame* stated:

The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the State courts, and no deliberate, well-considered decision to the contrary is to be found. [95 U.S. at 756-757.]

The right to recover in a civil action for the death of another came about not through evolution of the common law, but through legislative action. In 1846 England created a wrongful death action in Lord Campbell’s Act, 9 & 10 Vict., ch. 93. On these shores, following England’s lead, “statutes substantially the same in tenor followed in quick succession in one state after another, till today

no one could maintain a civil action to recover for the wrongful death of another. *See, e.g., Van Beeck*, 300 U.S. at 344 (“[A]n action of tort damages are not recoverable by any one for the death of a human being”). These doctrines have been modified by survival and wrongful death statutes, respectively.

The common law rule was given expression in the nineteenth century by Lord Ellenborough in *Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808), who declared that “in a civil court, the death of a human being could not be complained of as an injury.” *See Moragne*, 398 U.S. at 383; *Tiffany, supra* § 3 at 5. The rule of *Baker v. Bolton* early on became part of the common law of the United States. *See Moragne*, 398 U.S. at 384 (“American courts generally adopted the English rule as the common law of this country as well”). *See, e.g., Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475, 48 Am. Dec. 616, 617 (1848) (“[W]e can not doubt” that the rule of *Baker v. Bolton* “is the doctrine of the common law”).

there is not a state of the Union in which a remedy is lacking." *Van Beeck*, 300 U.S. at 346. *See also* 2 Dan B. Dobbs, *Law of Remedies* § 8.3(1) at 423 (2d ed. 1993) (discussing development of wrongful death and survival statutes); note 10, *supra* (explaining history of Alabama statute).

Thus, viewed in light of the common law background against which it was enacted, it is clear that Section 1983 does not establish either a survival or wrongful death action.²¹ That England and most States had enacted survival and wrongful death statutes by 1871 underscores that conclusion. Congress is presumed to have been aware of these developments, *see Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) ("the well-settled presumption [is] that Congress understands the state of existing law when it legislates"), and therefore must have known that, if the common law rule was to be abrogated, legislation like Section 1986 and similar state law provisions was required. Congress, however, chose not to abrogate the common law rule for actions brought under Section 1983.

This Court in analogous circumstances has refused to imply statutory remedies in derogation of the common law rule prevailing at the time of enactment. In *Panama Railroad v. Rock*, 266 U.S. 209 (1924), for example, a husband seeking to recover damages for the death of his wife—allegedly caused by the negligence of a railroad—invoked an applicable federal statute providing that “[h]e who shall have been guilty of an offense or fault, which has caused another damage, is obliged to repair it.” *Id.*

²¹ In fact, in urging adoption of what is now Section 1986, Representative Shellabarger—the floor manager of the Civil Rights Act of 1871 (which included both what is now Section 1983 and Section 1986)—expressly acknowledged that “at common law, where death ensues from a wrong against a person, there is no right of action.” Cong. Globe, 42d Cong., 1st Sess. 805 (1871). That rule was changed in Section 1986 with respect to certain violations of the rights guaranteed by Section 1985, but was not changed with respect to Section 1983.

at 211 (internal quotation marks omitted). This Court, however, refused to construe that generally worded statute as providing a wrongful death action, explaining that “the reach of the statute is to be determined by the application of common law principles,” and that “under the principles of the common law, it has required *specific statutes* to fix civil liability for death by wrongful act.” *Id.* at 214, 215 (emphasis added). Section 1983, like the statute in *Rock*, lacks specific language modifying the common law rule, and thus does not confer a cause of action for wrongful death. *See also Michigan Cent. R.R.*, 227 U.S. at 67 (Federal Employers Liability Act of 1908 did not depart from common law no-survival rule since it did not “expressly provide” for survival); *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 338 n.7 (1988) (same).

4. This Court’s decision in *Moragne v. States Marine Lines, Inc.*, *supra*, is not to the contrary, and provides no license for this Court to fashion a federal common law wrongful death or survival remedy for Section 1983. In *Moragne* this Court rejected the common law rule against recovery for death, and held that a cause of action for wrongful death can be prosecuted under general maritime law. In so holding, however, the Court expressly invoked its broad federal common lawmaking authority in admiralty, observing that “‘Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.’” 398 U.S. at 405 n.17 (quoting *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963)).²² Precisely the opposite is true here. Indeed,

²² *See also Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. at 624 (general maritime law is “a species of judge-made federal common law”); *American Dredging Co. v. Miller*, 510 U.S. 443, 445 (1994) (“there is an established and continuing tradition of federal common lawmaking in admiralty”); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) (“[T]he Judiciary has traditionally

through 42 U.S.C. § 1988 Congress has expressly precluded any such role for the courts, instructing instead that when existing federal law does not cover the area, courts should incorporate state law so long as doing so would not be inconsistent with federal law. *See infra* at 41-42.

This conclusion is firmly supported by the text of Section 1988. In determining under the first step of the Section 1988 analysis whether “the laws of the United States * * * are not adapted to the object, or are deficient” with respect to the question of the remedies available to a decedent’s estate under Section 1983, 42 U.S.C. § 1988(a), the Court is not at liberty to craft federal common law to fill any gaps in Section 1983’s remedial scheme. Read in context, the phrase “the laws of the United States” plainly refers to constitutional and statutory—but not common—law: the juxtaposition with the subsequent reference to “the common law,” to be resorted to in the event “the laws of the United States” are silent or deficient, confirms the latter phrase is distinct from and does not encompass the former.

More fundamentally, reading the phrase “laws of the United States” to include federal common law would render the second and third steps of the Section 1988 inquiry—to which we turn next—a nullity. This Court could always fill a perceived gap in a federal statutory scheme by creation of federal common law. If Congress had contemplated such an exercise *before* finding that “the laws of the United States” were “not adapted to the object, or [were] deficient,” there would have been no reason to include the borrowing provision of Section 1988. Yet Congress included such a provision and, through it, instructed courts in plain terms to borrow “the common law, as modified and changed” by the pertinent state law,

taken the lead in formulating flexible and fair remedies in the law maritime”).

id., rather than make federal common law, in filling gaps in the Section 1983 scheme. The *Moragne* paradigm accordingly has no place under Section 1988.

II. APPLICATION OF THE ALABAMA WRONGFUL DEATH ACT TO SECTION 1983 CLAIMS BROUGHT IN THAT STATE IS NOT INCONSISTENT WITH FEDERAL LAW.

1. Because federal law does not cover survival or wrongful death actions under Section 1983, the next step under Section 1988 is to consider application of “the common law, as modified and changed by the constitution and statutes” of the forum state. 42 U.S.C. § 1988(a).²³ Alabama, like each of the 49 other states, has abrogated the common law no-recovery-for-death rule, and, indeed, over the past century has enacted a comprehensive statutory survival and wrongful death scheme.

In Alabama a party may bring an action for wrongful death of a minor (Ala. Code § 6-5-391) or an adult (*id.* § 6-5-410), as well as for injuries to property resulting from acts causing death (*id.* § 6-5-411). Section 6-5-410—which Mrs. Jefferson’s representative invokes—permits a personal representative to maintain an action for the “wrongful act, omission, or negligence of any person” resulting in his decedent’s death. Because the purposes of this action are “to protect human life, to prevent homicide, and to impose civil punishment on takers of

²³ In *Burnett v. Grattan*, 468 U.S. at 48 (quoting Section 1988; emphasis added), this Court said that the inquiry under Section 1988’s second step is to look to “state ‘common law, as modified and changed by the constitution and statutes.’” That interpretation is plainly correct. But, to the extent Section 1988’s reference to “common law” could be construed otherwise, *cf. Robertson*, 436 U.S. at 589-590 n.5 (phrase could be interpreted to refer “to the kind of general common law that was an established part of our federal jurisprudence by the time of § 1988’s passage in 1866”), it is immaterial here, since, as was the case in *Robertson*, *see id.*, it is undisputed that Alabama has modified the common law by statute.

life," *Geohagen v. General Motors Corp.*, 279 So.2d at 439, the Alabama courts have for more than a century held that wrongs causing death are remedied through punitive rather than compensatory damages. *See note 10, supra.*

Under the third step of the Section 1988 analysis, Alabama law—and, in particular, Section 6-5-410—governs the recovery by a decedent's estate under Section 1983, unless it is "inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988(a). "This admonition is more than a mere technical obstacle to be circumvented if possible." *Burnett v. Gratton*, 468 U.S. at 60 (internal quotation marks omitted). Indeed, "[i]n enacting 42 U.S.C. § 1988 Congress determined that gaps in federal civil rights acts should be filled by *state law*, as long as that law is not inconsistent with federal law." *Hardin v. Straub*, 490 U.S. 536, 538 (1989) (emphasis added).²⁴ Courts are bound by this statutory directive in adjudicating Section 1983 actions. In this case Section 1988 compels the conclusion that the Alabama Wrongful Death Act governs the recovery available under Section 1983 by a decedent's estate for injuries to the decedent.

2. Petitioners' principal contention is that the Alabama Wrongful Death Act is inconsistent with Section 1983 because, given the interplay between this Court's decision in *Fact Concerts*—which bars recovery of punitive dam-

²⁴ *See also Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980) (Section 1988 "quite clearly instructs [courts] to refer to state statutes when federal law provides no rule of decision for actions brought under § 1983") (internal quotation marks omitted); *Robertson*, 436 U.S. at 593 n.11 ("§ 1988 instructs [courts] to turn to state laws, unless an 'inconsistency' with federal law is found"); *Wilson v. Garcia*, 471 U.S. at 281 ("This Court has consistently interpreted § 1988 as instructing that the rule applicable to the analogous state claim shall furnish the rule of decision 'so far as the same is not inconsistent with the Constitution and the laws of the United States'") (O'Connor, J., dissenting) (quoting Section 1988; citing additional authorities).

ages against a municipal defendant in a Section 1983 action—and the Alabama statute—which redresses wrongful death by the provision of punitive rather than compensatory damages—a decedent's estate may be barred from recovering compensatory and punitive damages from a municipal defendant in a Section 1983 action for injuries to the decedent. *See Pet. Br.* 5, 10-11. Under this Court's Section 1983 precedents, however, that argument fails.²⁵

a. There certainly is no express inconsistency between federal law and the Alabama Wrongful Death Act. As discussed, Section 1983—in accordance with the common law of the day in which it was enacted—has no survival or wrongful death provision. That omission is telling, because the 42d Congress plainly knew how to abrogate common law rules—which would otherwise be applied to actions brought under the Civil Rights Acts—when it wanted to do so, and expressly did so in Section 1986, in establishing a \$5,000 wrongful death remedy to redress certain violations of Section 1985 of the Civil Rights Acts. *See supra* at 20-21.

That the Alabama Wrongful Death Act may not furnish such a remedy in a particular instance simply cannot be deemed inconsistent with Section 1983, when the 42d Congress could have—but did not—furnish a federal wrongful death remedy in the first place. Any other conclusion presupposes that there must be such a remedy as a matter of federal law—a conclusion that cannot be

²⁵ Petitioners have not alleged that the Alabama statute intentionally discriminates against Section 1983. Nor could they. Alabama adopted its punitive-only damages rule more than a century before this Court held in *Fact Concerts* that punitive damages are unavailable against a municipality in a Section 1983 action. Indeed, for most of the time the Alabama rule has been in effect, municipalities were not liable for any damages under Section 1983. *See Fact Concerts*, 453 U.S. at 258-259.

squared with the common law rule at the time, well known to the members of Congress, and their deliberate action to provide such a remedy when they intended to do so. *See Fact Concerts*, 453 U.S. at 258 (“One important assumption underlying the Court’s decisions in this area is that members of the 42d Congress were familiar with common-law principles, * * * and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.”).

b. Nor is there any inconsistency between the Alabama Wrongful Death Act and the general policies of Section 1983—“compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law.” *Robertson*, 436 U.S. at 591. In *Robertson* this Court held that “[t]he goal of compensating *those injured* by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased’s estate.” *Id.* at 592 (emphasis added). At the same time, the Court distinguished the more typical claim in wrongful death actions, where “recovery [is sought] by survivors who are suing under § 1983 for injury to their own interests.” *See id.* at 592 n.9. *See also Moragne v. States Marine Lines, Inc.*, 398 U.S. at 385 (recognizing the distinction between actions brought to recover for a decedent’s “own personal claims” and those brought “to recover for the injury [a survivor] suffers from the victim’s death”).

The Section 1983 counts pleaded in this case seek recovery for injuries to a decedent, not to the interests of survivors. *See J.A. 9, 10-11*. Accordingly, as *Robertson* holds, Section 1983’s compensation goal would not be undermined by denying recovery, since any damages would go to the estate rather than to the party injured, who is dead and thus quite incapable of being compensated. *See, e.g., Carter v. City of Birmingham*, 444 So.2d

at 376 (“It is clear that where the injured party is deceased, any damage award would not compensate *him* for his injuries, because the cruel fact is that he is no longer present to benefit from any damages awarded. No damage award could compensate *him*.”) (internal quotation marks omitted; emphasis in original); *Bowling v. Oldham*, 753 F. Supp. 588, 590 (M.D.N.C. 1990) (“Compensating the injured party is immaterial because [he] is dead.”); *Jones v. George*, 533 F. Supp. 1293, 1305 (S.D.W.V. 1982) (“The other stated policy of § 1983, that of compensating the victim of constitutional deprivation, is not in issue as it relates to personal injury claims, since Elmer Combs is dead.”); *Prunty v. Schwantes*, 162 N.W.2d 34, 39 (Wis. 1968) (“After a person dies, he can no longer be compensated”).²⁸

Even the decision on which petitioners most heavily rely—*Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), *see Pet. Br. 4, 5, 11, 12, 15, 19*—would not afford them the recovery they seek. Although the district court there found the foreclosure of compensatory damages under the Alabama Wrongful Death Act inconsistent with Section 1983, it held that awarding compensatory damages was only required under Section 1983 for losses incurred “by the decedent’s survivors,” such as loss of consortium and their own pain and suffering. *Id.* at 1309.

²⁸ Petitioners assert that this principle—squarely embraced by this Court in *Robertson*, 436 U.S. at 592—cannot be applied to bar recovery for compensatory damages to a decedent’s estate when the act complained of is a deprivation of federal rights resulting in death, rather than injury (however grave or painful). *See Pet. Br. 13 & n.5*. But while Section 1983’s interest in deterring constitutional violations may be stronger in the case of death, there is no reason to conclude that the goal of compensation is any more apposite when an estate sues for damages to a decedent killed by a deprivation of federal rights as opposed to a decedent injured by a deprivation of such rights, who later dies of another cause. In neither case is Section 1983’s goal of compensation advanced by attempting to “compensate” the decedent’s estate.

The court saw “no reason * * * to award compensatory damages for the *decedent’s* claims,” because, as the court put it, “[o]bviously, the decedent cannot be compensated at this point and such damages are not necessary to compensate his survivors.” *Id.* (emphasis added). Because petitioners do not seek recovery under Section 1983 for injury to their own interests as a result of Mrs. Jefferson’s death, there is no occasion for this Court to reach the question decided in *Weeks*. *See American Dredging Co. v. Miller*, 510 U.S. at 457 (“it is quite impossible for [the Court’s] holding to be any broader” than the facts presented in the case before it).

Because Mrs. Jefferson can no longer be compensated for her injuries, any recovery on her behalf would require awarding damages under Section 1983 “for noncompensatory damages measured by the jury’s perception of the abstract ‘importance’ of a constitutional right”—something that Alabama law may permit through operation of its punitive damages regime, but which this Court has held Section 1983 “leaves no room for.” *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 309-310 (1986). *See Carey v. Piphus*, 435 U.S. at 260-261 (rejecting notion of awarding damages “to compensate * * * for the injury which is inherent in the nature of the wrong” in absence of proof of actual damages) (internal quotation marks omitted); *Stachura*, 477 U.S. at 308 (“*Carey* * * * makes clear that the abstract value of a constitutional right may not form the basis for § 1983 damages.”) (footnote omitted).²⁷

²⁷ This is particularly true in the case of the demand for the “pain, humiliation, and suffering [Mrs. Jefferson] endured.” J.A. 9, 10-11 (quoting complaint). “[D]amages for pain and suffering are * * * not truly compensatory,” inasmuch as “[t]hey are inherently noneconomic and are established through the subjective discretion of the jury.” *Monessen Southwestern Ry. v. Morgan*, 486 U.S. at 348 n.5 (Blackmun, J., joined by Marshall, J., concurring in part and dissenting in part) (citing Dan B. Dobbs, *Law of Remedies* § 8.1 at 548-550 (1973)).

Moreover, this Court itself has recognized that compensatory damages will not always be available for violations of Section 1983. *See, e.g., Carlson v. Green*, 446 U.S. at 22 n.9 (“punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury”). Indeed, even after barring recovery of punitive damages in Section 1983 actions against municipalities in *Fact Concerts*, this Court has reiterated that there will be situations in which Section 1983 plaintiffs will not be able to obtain any compensatory damages, *see, e.g., Smith v. Wade*, 461 U.S. at 55, and thus will be barred from recovering against municipal defendants anything other than nominal damages. *See Carey v. Piphus*, 435 U.S. at 266-267 & n.24 (“deprivation of [constitutional] rights [is] actionable [under Section 1983] for nominal damages without proof of actual injury”). The Court has never suggested, however, that this result is intolerable in light of the general compensation aim of Section 1983.

c. Nor does the Alabama Wrongful Death Act conflict with Section 1983’s general policy of deterrence. Indeed, as this Court itself has recognized, the emphatic purpose of the Alabama wrongful death statute is deterrence. *See Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927) (“the aim of the [Alabama wrongful death] statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it”). *See also Bell v. Riley Bus Lines*, 57 So.2d 612, 615 (Ala. 1952) (the Alabama wrongful death act is intended to “effect[] the declared public policy of preventing homicides”); Gamble, *supra* § 37-9 at 549 (“The purpose of the wrongful death statutes has been stated in a variety of fashions, but the general theme running through these statements is that the court has determined that the intent of the legislature was to punish the wrongdoer and provide a deterrent

aimed at dissuading others from acting in a similar manner"); cases cited *supra* at 10-11. Nor has Alabama shied away from subjecting municipalities to liability for wrongful death. *See, e.g., Benson v. City of Birmingham*, 659 So.2d 82 (Ala. 1995) (municipality held liable for \$100,000 plus interest in connection with wrongful shooting of minor).

In order to find that the Alabama Wrongful Death Act has even a marginal influence on the behavior of municipalities in Alabama, this Court would have to disregard the "reasonable assumption" that government officials are motivated "by concern for the Government's integrity," *Carlson v. Green*, 446 U.S. at 21, and assume instead that Alabama municipalities (1) contemplate illegal activity in violation of Section 1983; (2) are aware of the intricacies of the Alabama wrongful death and Section 1983 remedial schemes; (3) would intentionally kill an individual or permit her to die, rather than violate her federal rights to a lesser extent, in order to avoid liability under Section 1983; and (4) would do so fully aware that they may still be subjected to liability for punitive damages in a state law action for wrongful death. This Court has never been willing to make such "far-fetched assumptions," *Robertson*, 436 U.S. at 593 n.10, even when, as here, the challenged remedial rule had the effect of substantially reducing, *e.g., Fact Concerts*, 453 U.S. at 268-270, or barring altogether, *e.g., Robertson*, 436 U.S. at 592, the recovery available against a state actor under Section 1983.²⁸

²⁸ Alabama has abolished the doctrine of municipal immunity, exposing Alabama cities to civil liability for wrongful acts. *See Jackson v. City of Florence*, 320 So.2d 68 (Ala. 1975); Ala. Code § 11-47-190. Indeed, Alabama municipalities are more vulnerable to such liability than their kindred in numerous other states. *See Owen v. City of Independence, Mo.*, 445 U.S. 622, 683 n.27 (1980) (Powell, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., dissenting). By statute, Alabama, like many states, has capped the damages available against a municipality—in any action—at

Because municipalities are not capable of acting without human involvement, this Court would have to make an additional assumption to find the Alabama statute inconsistent with Section 1983's deterrence aim. It would have to assume that the behavior of the individual officers or employees involved in any alleged wrongdoing would be uninfluenced by the fact that *they* may be held liable under Alabama law *and* Section 1983 for their own actions, in addition to being subjected to public "shame and humiliation," possible "corrective action" such as discharge, and state and federal criminal liability. *Fact Concerts*, 453 U.S. at 269. The Alabama Supreme Court specifically recognized this prospect in *Carter*. *See* 444 So.2d at 380 ("[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him") (quoting *Robertson*, 436 U.S. at 592; emphasis in *Carter*). And, as this Court observed in *Fact Concerts*, "a damages remedy recoverable against individuals is *more* effective as a deterrent than the threat of damages against a government employer." 453 U.S. at 270 (emphasis added).

d. At bottom, petitioners' position is that the Alabama Wrongful Death Act is inconsistent with federal law because it does not permit recovery on the particular Section 1983 claims they have pressed. This Court, however, has squarely rejected such a result-oriented approach to the Section 1988 analysis, emphasizing that "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson*, 436 U.S. at 593. Section 1988 compels that conclusion. As Justice Marshall explained for the Court in *Robertson*, "[i]f success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source

\$100,000. Ala. Code. § 11-93-2, discussed at note 11, *supra*. It is implausible to suggest, however, that a municipality, in Alabama or elsewhere, would wantonly subject itself to judgments of that magnitude, even accepting the far-fetched assumptions stated above.

would essentially be irrelevant. But § 1988 quite clearly instructs [courts] to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby." *Id. Accord Board of Regents v. Tomanio*, 446 U.S. at 488.

This reasoning is especially compelling when, as here, the plaintiff has failed fully to avail himself of the avenues of redress under Section 1983. Quite unlike the statutory scheme challenged in *Robertson*, the Alabama scheme does not deny plaintiffs any avenue of redress *under Section 1983*. Indeed, while petitioners have neglected to pursue them, Alabama plaintiffs may seek punitive damages under Section 1983 and the Alabama Wrongful Death Act against the individual officers or employees involved in the alleged wrongdoing. *See Smith v. Wade*, 461 U.S. at 36 n.5, 56 (punitive damages are available against individual Section 1983 defendants for conduct "motivated by evil motive or intent," or "involv[ing] reckless or callous indifference" to federal rights); J.A. 8-10 (pleading Section 1983 claims against "[f]ictitious parties * * * [who] are agents and/or employees of the City of Tarrant, and/or the City of Tarrant Fire Department" in their "individual and official capacities" for "intentional" and "wanton" misconduct).²⁹ As this Court has recog-

²⁹ Under Alabama law individual government officers and employees are required to be indemnified for "damages arising out of the performance of their official duties" for negligent but *not* "intentional or willful or wanton" conduct. Ala. Code § 11-47-24(a). The City of Tarrant—like all or virtually all other Alabama municipalities—does not follow any practice of indemnifying its employees for intentional, willful, or wanton misconduct. Petitioners here sued as fictitious parties the individuals involved in the alleged wrongdoing, in both their individual and official capacities, and have alleged that they engaged in "intentional" and "wanton" misconduct. J.A. 4-5, 8-10. Thus, if petitioners had undertaken to prove the allegations, they would have been entitled to an award of (uncapped) punitive damages under Section 1983 and the Alabama wrongful death act. *See note 11, supra*. Petitioners, however, never attempted to substitute the actual individuals for the fictitious parties named in the complaint, and thus forewent such damages claims.

nized, for a variety of reasons—including the history of Section 1983—individual wrongdoers are more natural targets of Section 1983 claims than municipalities. *See Fact Concerts*, 453 U.S. at 265, 267, 270.³⁰

Finally, the incantation of Section 1983's broad purposes is not, in itself, sufficient to displace the state law rules that Congress has directed courts to apply under Section 1988. As this Court has observed, general statutory purposes may not be invoked to "add features that will achieve the statutory 'purposes' more effectively. Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be." *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). *See also Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in original). Courts therefore are not at liberty simply to supplement federal statutes as they see fit, whenever they believe the statutory purposes will be marginally advanced thereby. As *Robertson* underscores, this fundamental principle of statutory construction is fully applicable in the case of Section 1983. Accordingly, the general policies of Section 1983 do not provide *carte blanche* to retool the statute's remedial scheme as courts may see fit.

4. Because the Alabama Wrongful Death Act is not inconsistent with Section 1983, Section 1988 dictates that

³⁰ Of course, petitioners also may pursue their punitive damages claims under the Alabama Wrongful Death Act against the municipal defendant in this case under state law in prosecuting Count I of their complaint, which is pending on remand.

the statute governs the recovery by a decedent's estate in an action brought in Alabama pursuant to Section 1983. Petitioners are quite wrong in suggesting that this result is unacceptable on the ground that incorporating state law would alter their Section 1983 rights. As this Court has recognized, the natural consequence of Section 1988 is that "state law will often provide the content of the federal remedial rule," and that "there will not be nationwide uniformity on these issues." *Robertson*, 436 U.S. at 594 n.11 (emphases added). *Accord Tomanio*, 446 U.S. at 489. *See also Chardon v. Soto*, 462 U.S. 650, 663 (1983) ("§ 1988 embodies a congressional determination that the laws of the several States provide the most suitable procedural and remedial rules for application in actions brought under the federal civil rights laws") (Rehnquist, J., joined by Powell and White, JJ., dissenting).³¹

Carlson v. Green, supra, is not to the contrary. The Court in *Carlson* emphasized the need for a uniform federal survivorship rule for *Bivens* actions, rejecting the incorporation of state survivorship rules even when state laws were not inconsistent with federal law. 446 U.S. at 23. In Section 1983 actions, however, Congress has expressly specified through Section 1988 that state laws apply when they are not inconsistent with federal law. As the *Carlson* Court noted in distinguishing *Robertson*, "Section 1988 does not in terms apply to *Bivens* actions, and there are cogent reasons not to apply it to such actions even by analogy. * * * While it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work, federal officials have no similar claim to be bound

³¹ The *Robertson* Court explained: "whatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues." 436 U.S. at 594 n.11.

only by the law of the State in which they happen to work." 446 U.S. at 24-25 n.11. *Carlson* accordingly is no help to petitioners.

III. THIS COURT SHOULD NOT UNDERTAKE TO FASHION A FEDERAL COMMON LAW SURVIVAL OR WRONGFUL DEATH REGIME FOR SECTION 1983.

1. In place of the Alabama Wrongful Death Act, petitioners urge the creation of a federal common law rule governing Section 1983 actions, entitling a decedent's estate to recover compensatory damages for injuries to the decedent. Because Section 1988 compels incorporation of the Alabama statute, however, petitioners' call for action should be addressed to Congress, not this Court.

a. This Court's federal common lawmaking authority is quite limited. "[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). *Accord Atherton v. FDIC*, 117 S. Ct. 666, 670 (1997). Thus, "[t]he enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally not made by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-313 (1981).

The determination "whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *Atherton*, 117 S. Ct. at 670 (internal quotation marks omitted). Section 1988 leaves no room for federal common lawmaking. Thus, in *Runyon v. McCrary*, 427 U.S. 160, 184 (1976),

this Court expressly rejected the argument that Section 1988 “commission[s] * * * courts to search among federal and state statutes and common law for the remedial devices and procedures which best enforce the substantive provisions of Sec. 1981 and other civil rights statutes.” And, in *Robertson*, the Court stressed that “rules in areas where the courts are free to develop federal common law,” such as in admiralty, “have no bearing [under Section 1988].” *Robertson*, 436 U.S. at 593 n.11. Accordingly, any dissatisfaction with the remedies available to Section 1983 plaintiffs in Alabama for wrongful death should be addressed to Congress, not this Court.

This Court reached the same conclusion in *Chardon v. Soto, supra*, in holding that Section 1988 compels incorporation of state statutes governing the tolling of statutes of limitation in class actions asserting Section 1983 claims. Following this Court’s Section 1988 analysis in *Robertson*, the Court in *Chardon* concluded that “Congress [through § 1988] has decided that § 1983 class actions brought in different States, like individual actions under § 1983, will be governed by differing statutes of limitations and differing rules regarding tolling and tolling effect unless those state rules are inconsistent with federal law.” 462 U.S. at 662. Thus, “[u]ntil Congress enacts a federal statute of limitations to govern § 1983 litigation,” courts must continue to borrow the applicable state laws. *Id.* So too here, until Congress enacts a federal statute governing the recovery available in wrongful death or survival actions brought under Section 1983, courts must continue to borrow state law.

b. There is no reason to suppose that Congress will not act if it considers such action appropriate. In fact, Congress has acted to address the limitation on recovery resulting from the interplay between applicable federal and Alabama damages rules in wrongful death actions brought in contexts other than Section 1983.

For example, the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 1346(b), makes the United States liable for the negligence of its ~~employees~~ under applicable state law, but does not displace the government’s traditional immunity from punitive damages. In FTCA actions brought for wrongful death in Alabama and Massachusetts—which for most of this century also allowed recovery only for punitive damages under its wrongful death statute—the government took the position that it was “not liable” under the FTCA, “since local law assessed only ‘punitive damages.’” *Massachusetts Bonding & Ins. Co. v. United States*, 352 U.S. 128, 131 (1956). Congress responded in 1947 by amending the FTCA to make the United States liable for “actual or compensatory damages,” when the law of the state in which the wrong occurred provides “for damages only punitive in nature.” 28 U.S.C. § 2674. *See Heath v. United States*, 85 F. Supp. 196 (N.D. Ala. 1949) (applying 1947 amendment in wrongful death action brought under Alabama law).

A slightly different situation has arisen in connection with wrongful death actions brought against the Tennessee Valley Authority (“TVA”). The TVA is a federally owned corporation that—like other federal instrumentalities—is immune from liability for punitive damages. Congress has excluded the TVA from the scope of the FTCA (and its 1947 amendment). 28 U.S.C. § 2680(l). As a result, the TVA in numerous suits has succeeded in avoiding liability under the Alabama Wrongful Death Act on the ground that the statute only provides for punitive damages, with respect to which the TVA, as a federal entity, is immune. *See, e.g., Heathcoat v. Potts*, 905 F.2d 367 (11th Cir. 1990); *Springer v. Bryant*, 897 F.2d 1085 (11th Cir. 1990); *Painter v. Tennessee Valley Auth.*, 476 F.2d 943 (5th Cir. 1973) (per curiam). While expressing consternation with this result, the courts have “decline[d] to assume the temerity to so intrude in matters traditionally committed to the States as to declare the existence of a federal right in the survivors to recover

for a decedent's death," and, instead, have held that "[t]he aberration in such cases must find its remedy through [congressional action]," *Painter*, 476 F.2d at 944-945, as it did in the case of the FTCA. Any dissatisfaction with the result dictated by Section 1988 in this case should be met by this Court with the same restraint.

Of course, Congress may decide not to act. Congress did not see fit to create a survival or wrongful death remedy for Section 1983 when it was first enacted—even though, as noted, it did furnish such a remedy for other provisions of the Civil Rights Acts. Out of considerations of federalism, Congress may decline to follow the example of the FTCA; it is one thing for Congress to waive its own sovereign immunity, and another to subject state governments to additional liability under Section 1983. *Cf. Tomanio*, 446 U.S. at 492 ("[c]onsiderations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. § 1983"). And Congress may conclude that a uniform federal wrongful death or survival regime is not desirable for Section 1983; indeed, this Court itself has observed that "it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work." *Carlson*, 446 U.S. at 24. In any event, these judgments are more appropriate for Congress than this Court.

2. The alternative is for this Court to undertake the wholesale creation of a federal common law wrongful death and survival regime for Section 1983, displacing not only Alabama's wrongful death statute but the wrongful death and survival laws of the other 49 states, too. Analytically, it is quite impossible for this Court to conclude that the Alabama Wrongful Death Act is inconsistent with federal law without first determining—contrary to the Court's existing precedent—that Section 1983 guarantees a survival or wrongful death remedy to a decedent's estate for injuries to the decedent. That determination effectively will "federalize" a wrongful death or survival remedy for

Section 1983, and thus render Section 1988's borrowing provision inapplicable, not only to the question whether petitioners are entitled to compensatory damages for the "full value of Alberta K. Jefferson's life, and the pain, humiliation, and suffering she endured," J.A. 9, 10-11, but to the plethora of other issues that inevitably will arise in adjudicating wrongful death or survival claims brought under Section 1983 in Alabama, and in other states as well.

The extent to which a refusal to incorporate the Alabama wrongful death regime pursuant to Section 1988 would engage the federal courts in impermissible lawmaking is clear when considering the remedial scheme courts would be required to weave in place of state law. If the Court were to decide—contrary to the state law rule—that compensatory damages must always be recoverable under Section 1983 for injuries to a decedent, the Court would next have to decide how those damages should be measured. Congress and the states have adopted a dizzying array of schemes for calculating compensatory damages in wrongful death and survival actions, which, while overlapping in some respects, conflict in many others.³²

³² Damages may be measured according to injuries to the decedent or to survivors. When, as here, the plaintiff seeks compensation for injuries to the decedent, states take into account varying considerations, including loss of contribution and support, loss of profits in business enterprises, diminished earning prospects, loss of prospective earning power, and estimated duration of contributions. There are majority and minority positions among the states on whether each of these elements is recoverable. States then subject plaintiffs to differing burdens of proof to establish such elements of a damages award. In addition, in some states plaintiffs may recover funeral and burial expenses, medical expenses, and pain and suffering prior to death. An entirely different maze of conflicting damages rules exists for survivors attempting to recover for their own injuries as a result of death, such as loss of consortium or companionship, mental anguish, or pain and suffering of their own. *See generally* 1 Stuart M. Speiser, Charles F. Krause, Juanita M. Madole, *Recovery for Wrongful Death and Injury*

Each of these schemes was adopted based on different policy considerations; it is by no means apparent which should be adopted as the federal common law rule.

This case, moreover, is just the tip of the iceberg. Creating a federal common law rule of damages here would create incongruities with any number of other state wrongful death and survival schemes, which in turn will spur additional litigation of this type. In addition, once the Court has undertaken the task of fashioning a federal common law of wrongful death or survival under Section 1983—which it has wisely eschewed to date—it will inevitably be asked to fashion innumerable other aspects of the wrongful death or survival remedy in cases brought by plaintiffs claiming that state law is inadequate, including, to mention only a few, deciding who is entitled to recover in wrongful death or survival actions (e.g., administrators, parents, siblings, or extended relatives), when such actions may abate, what standard of proof is required to prove damages such as pain, humiliation, or suffering by a decedent, how to calculate the value of a decedent's life, and whether limits may be placed on particular forms of recovery and, if so, at what particular level.

* * * *

In enacting the Civil Rights Acts, Congress did not vest in the courts the responsibility to implement the Section 1983 remedy as they saw fit, but directed instead that courts should incorporate state law as long as it is not "inconsistent" with federal law. Nothing in Alabama's Wrongful Death Act is inconsistent with federal law, including Section 1983 and the general policies underlying it. Accordingly, that state law governs the recovery by the representative of the decedent's estate in this case.

§§ 3:5 to -3:6 (1992) (surveying different state remedial schemes for survival and wrongful death actions).

CONCLUSION

For the foregoing reasons, the writ of certiorari should be dismissed as improvidently granted. Alternatively, the judgment of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

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No. 96-957

CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

MELVIN JEFFERSON, individually
and as the Administrator of the
Estate of Alberta K. Jefferson;
LEON JEFFERSON; and BENJAMIN JEFFERSON,
Petitioners,

v.

CITY OF TARRANT, ALABAMA,
Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITIONERS' REPLY BRIEF

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25 PP

I. QUESTION PRESENTED

Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act, § 6-5-410 (Ala. 1975), governs the recovery by the representative of the decedent's estate under 42 U.S.C. § 1983?

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PETITIONERS' REPLY BRIEF

A. This Court Has Jurisdiction To Review The Order Of The Alabama Supreme Court.

This case arises out of the death of Alberta K. Jefferson in a fire at her home on or about December 4, 1993. Melvin Jefferson brought an action individually, and as the personal representative of Alberta K. Jefferson. As the representative of Alberta K. Jefferson's estate, Melvin Jefferson brought separate claims under Ala. Code § 6-5-410 (1975) (the "state law claim"), and pursuant to 42 U.S.C. § 1983 (*Id.*). Claiming is that the City of Tarrant, Alabama discriminated against Alberta K. Jefferson and other disfavored minorities by engaging in a pattern and practice and custom of denying protective services to disfavored minorities (JA, p. 10).

On June 24, 1995, defendant City of Tarrant, Alabama ("the City" or "Tarrant") moved for summary judgment. On June 30, 1995, the City filed a Motion for Judgment on the Pleadings (JA, p. 113). On July 17, 1995, Defendant's motions for Summary Judgment and for Judgment on the Pleadings were denied (JA, p. 113). Pursuant to Alabama Rule of Appellate Procedure 5(a), Judge Drayton James of the Circuit Court of Jefferson County, Alabama entered a "Statement of Circuit Court Judge" stating that seeking an immediate appeal of the §1983 survivorship question. (JA, p. 109). The question presented to the Alabama Supreme Court was, "Whether the survival of Alberta K. Jefferson's claim for compensatory damages under 42 U.S.C. § 1983 is governed by federal common law or by reference to the Alabama Wrongful Death Statute?" (JA, pp. 109-110). The Alabama Supreme Court granted permission to appeal (JA, pp. 115-116).

On July 12, 1996, the Supreme Court of Alabama issued its Opinion (JA, pp. 117-125) on the federal issue (JA, p. 118). The Alabama Supreme Court did not con-

sider the remaining state law claim. The Alabama Supreme Court, as to the § 1983 claim reversed the Trial Court's ruling on Defendant's motions for summary judgment and for judgment on the pleadings, and remanded the case for further proceedings consistent with its opinion (JA, p. 121). Plaintiffs filed an Application for Rehearing on the § 1983 question, which was denied on August 30, 1996 (JA, p. 126).

Defendant argues that the Alabama Supreme Court's decision is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a) because of the remand of the state law claim. Defendant goes on to argue that this Court is without jurisdiction because this Court's review of state court decisions is limited to "final judgments or decrees rendered by the highest court of the state in which a decision could be had." (Respondent's Brief, p. 4). However, final judgment as to the survivability of Alberta K. Jefferson's claim under 42 U.S.C. § 1983 has been rendered by the highest court in Alabama - the Alabama Supreme Court.

Defendant points out that the finality requirement is not a "technicality," (Appellees Brief, p. 5), but fails to mention that in deciding jurisdiction, the Court will examine "both the judgment and the opinion as well as other circumstances which may be pertinent in deciding whether a final judgment has been rendered." *Gospel Army v. Los Angeles*, 331 U.S. 534, 548 (1947).

Defendant urges an extremely limited, narrow, and literal reading of § 1257. The Court, however, has stated that a "practical rather than a technical construction" of the finality requirement should be given. *Cohen v. Beneficial Loan Corp.*, 69 S.Ct. 1221 (1949). See also, *Bradley v. Richmond School Board*, 94 S.Ct. 2006, 2022 n. 28 ("a pragmatic approach" should be taken on the question of finality). In *Hudson Distributors v. Eli Lily & Co.*, 84 S.Ct. 1273 (1964), the Court held that, "the fact that separate and unresolved issues are pending in the Ohio courts

and still subject to further proceedings . . . does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or unappealable within the meaning of 28 U.S.C. § 1257." *Hudson*, 84 S.Ct. at 1273. Similarly, the fact that separate state law issues remain in the Alabama state courts does not affect the finality of the Alabama Supreme Court's decision on the federal issue before this Court.

In *Cox Broadcasting Corp. v. Cohen*, 95 S.Ct. 1029 (1975), the Court enumerated four categories in which the Court has treated a decision on the federal issue involved as a final judgment for the purposes of 28 U.S.C. § 1257, and has taken jurisdiction despite the pendency of further proceedings in the lower state courts on separate and unresolved issues. Jurisdiction is found despite further state court proceedings on separable state law issues to avoid "the mischief of economic waste and of delayed justice." *Cox*, 95 S.Ct. at 1037. The *Cox* Court held that the Supreme Court has jurisdiction, despite pending, unresolved state law issues "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but that which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 95 S.Ct. at 1039. That is exactly the case here. The question of the survivability of Alberta K. Jefferson's claim, the only federal issue before the Court, has been decided. While the case has been remanded to the Circuit Court of Jefferson County, Alabama for proceedings on the state law claim, no review of the federal issue can be had by any Alabama court, regardless of the outcome on the state law claim. See also, *North Dakota State Water Pharmacy v. Snider's Drug Stores, Inc.*, 94 S.Ct. 407 (1973) (Court held there was jurisdiction because the federal issue would not survive the remand, whatever the result of further state proceedings); *Southland Corp. v. Keeting*, 104 S.Ct. 852 (1984).

Additionally, the *Cox* Court found Supreme Court jurisdiction over cases where the federal issue, finally decided by the highest court in the state, will survive and require decision regardless of the outcome of future state court proceedings. In this case, the issue of the survivability of the claim of the Estate of Alberta K. Jefferson will survive and require decision regardless of which party is successful on the state law claims. Simply put, the federal issue is separate and distinct from the state law claim such that the federal issue will be unaffected by any future proceedings on the state law claim. *See also, American Export Rides, Inc. v. Alvez*, 446 U.S. 274, 278 n. 7 (1980) (finality of separate merit time loss of society claim not affected by non-finality of other claims not yet tried, in reliance on second *Cox* category); *NAACP v. Clebourne Hardware Co.*, 458 U.S. 886, 907 n.42 (1982) (first amendment ruling deemed final despite remand for a recomputation of damages).

B. It Is Clear That Death Is One Of The Constitutional Deprivations Meant To Be Remedied By 42 U.S.C. § 1983.

The statutory language of 42 U.S.C. § 1983 does not provide for the survival of a claim brought pursuant to its provisions. However, there is no question that § 1983 is just as operative in cases where the constitutional wrong causes death as it is where a lesser injury results. The Court in *Robertson v. Wegman*, 98 S.Ct. 1991, 1994 (1978), noted that the survival of § 1983 actions is not specifically addressed by the statutory language of the Civil Rights Act. It has never been held that § 1983 actions do not survive the death of the constitutional victim. It has widely been held that § 1983 actions do not evaporate upon the death of the wronged party, and that the action survives by reference to the federal common law if the application of a state survivorship

provision affects the remedies available to a § 1983 litigant.¹

Every federal court considering the question of whether state procedural provisions can limit the remedies available to a § 1983 claimant where the constitutional deprivation complained of causes death has answered that the state law must yield. Section 1983 remedies are not to be narrowly construed. The history of § 1983 stresses that, "as a remedial statute, it should be 'liberally and beneficially construed.'" *Dennis v. Higgins*, 111 S.Ct. 865, 867 (1991), quoting Rep. Shallabarger, Cong. Globe 42nd Cong., 1st Sess. App. 68 (1871). The remedies available to a § 1983 claimant are to be widely construed where, "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

Beginning with *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961), Courts throughout the country have recognized that Congress did not intend to foreclose § 1983 claims

¹The lower federal courts have uniformly held that the application of a state statute in a death case that would in any significant way limit a § 1983 litigant's remedies is "clearly deficient in both its remedy and its deterrent effect." *Berry v. City of Muskogee*, 900 F.2d 1489, 1504 (10th Cir. 1990) (Oklahoma statute that would have limited damages in death cases to property loss and lost earnings would not be applied, and remedy would be provided by federal common law). *See, e.g., McFadden v. Sanchez*, 710 F.2d 907 (2d Cir. 1983), cert. denied, 464 U.S. 961 (1983) ("To whatever extent § 1988 makes state law applicable to Section 1983 actions, it does not require deterrence to a survival statute that would bar or limit the remedies available under Section 1983 for unconstitutional conduct that causes death."). *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (held that it would be inconsistent with federal laws to limit estate of decedent to \$25,000.00 Wisconsin statutory amount in § 1983 death claim). A more complete list of similar cases is contained at p. 17 of Petitioners main brief.

when death, rather than a lesser injury, results. To contend that the absence of a specific statutory mechanism for survivorship actions precludes the survivorship of § 1983 claims is to give the civil rights statutes their narrowest construction. Such restrictive readings have "long been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, while reading text in light of context . . . to carry out in particular cases the generically express legislative policy." *Brazier*, 293 F.2d at 404, quoting *SEC v. Joiner Leasing Corp.*, 64 S.Ct. 120, 123 (1943).

In the face of overwhelming authority favoring the application of § 1983 to death actions. *See supra*, at note 1. Defendant cites general rules of statutory construction, concluding that because § 1983 does not expressly provide for survivorship, such actions are not to be found. Defendant's assertion that Congress did not intend to include death among the civil rights violations to be remedied by the Civil Rights Act of 1871 is simply false. In holding that the federal remedies provided for by § 1983 are supplemental to, and not *in place of or to be supplanted by* state law, the Court in *Monroe v. Pape*, 81 S.Ct. 473 (1961) cited no less than four instances from floor debates surrounding the Civil Rights Acts of 1871 wherein death is specifically mentioned as one of the constitutional wrongs to be remediated by the Civil Rights Act of 1871.²

²Additional support for reading § 1983 as intending a remedy for wrongful killings under color of law comes from an examination of a criminal civil rights act counterpart. Section 1 of the 1871 act was modeled after the criminal provision contained in § 2 of the Civil Rights Act of 1866 (current version at 18 U.S.C. § 242). With the exception that § 1 of the 1871 act was not limited to former slaves as was the earlier enactment, Rep. Shellabarger informed the House that § 1 of the proposed act was intended to establish a civil remedy in cases in which § 2 of the 1866 act created a criminal sanction. *Id.* Thus, "[b]ecause § 2 of the Civil Rights Act of 1866 had extended

By arguing that § 1983 never envisioned a cause of action surviving the injured party, Defendant suggests that this Court find that 36 years of cases from all over the country holding that § 1983 claims *do* survive have been decided in error. *See, Brazier, supra*, and cases cited at note 1. As the Court in *Moor v. County of Alameda, Cal.*, 93 S.Ct. 1785, 1792 (1973), recognized, existing federal law "will not cover every issue that may arise in the context of a federal civil rights action . . . [and that civil remedies will be found by looking] to principles of the common law, as altered by state law, *so long as such principles are not inconsistent with the Constitution and laws of the United States.*" A construction limiting § 1983 remedies to those causes of action specifically stated in the statutes is not favored.

Defendant argues that § 1983 should not apply because it states that anyone acting under color of state law who deprives another of their right shall be liable "to the party injured." 42 U.S.C. § 1983. The defendant draws the conclusion that, because the decedent is no longer living, there is no "injured party". First, this argument ignores the vast weight of lower court authority holding that § 1983 does provide a death remedy. Second, this Court need look no further than *Robertson, supra*, to see that this argument must fail. In *Robertson*, after the plaintiff filed a § 1983 action, but before the case proceeded to trial, the plaintiff died. The action abated under a Louisiana statute stating that such an action in Louisiana survives only in favor of a spouse, children, parents, or

the criminal sanction to situations in which persons acting under color of state law deprived others of their life, there can be little doubt that § 1 of the Civil Rights Act of 1871 was also intended to provide a civil remedy in such cases." *Berry*, 960 F.2d at 1501, citing *Steinglass, Wrongful Death Actions and Section 1983*, 60 I.d. L.J. 559, 645-47 (1985); *Steinglass, supra*, at 648; *see also Screws v. United States*, 65 S.Ct. 1031 (1945); *Brazier v. Cherry*, 293 F.2d 401, 404 & n. 9 (5th Cir.), cert. denied, 82 S.Ct. 243 (1961).

siblings. The plaintiff had no qualifying relatives. Had the Court wished to articulate the law as urged by the defendant, it merely had to state that because the party injured no longer survived, the cause of action was one to enforce *someone else's rights, and did not exist under the statutory language of § 1983*. Instead, the *Robertson* Court was very careful to distinguish instances in which the illegal conduct caused the plaintiff's death from the facts in that case, stating that its holding "does not, of course, preclude survival of a § 1983 action when such is allowed by state law, [internal citation omitted], nor does it preclude recovery by survivors who are suing under § 1983 for an injury to their own interests." *Robertson*, 98 S.Ct. at 1996, n.9.

C. The Existence Or Non-Existence Of Death Remedies In 1871 Does Not Preclude The Adoption Of Such A Remedy In A § 1983 Action.

Defendant argues that, because § 1983 does not contain a death provision, and that when the Civil Rights Act of 1871 was enacted, generally speaking, actions did not survive the death of the plaintiff, that if Congress had envisioned the survivorship of § 1983 actions, it would have provided for such. This argument of abatement by omission ignores this Court's holdings in *Dennis*, *Moor*, and *Sullivan, supra*, that suitable remedies are to be found where possible, and broadly construed, and that existing federal law will not cover every issue that may arise in the context of federal civil rights litigation. *Moor*, 93 S.Ct. at 1792.

The *Moor* Court recognized, and Defendant admits that, "the tort liability created by § 1983 cannot be understood in a historical vacuum." *Fact Concerts*, 473 U.S. at 258. This Court has recognized the necessity of suitable extension of the federal common law to provide death remedies.

Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as "barbarous." [internal citations omitted]

Moragne v. States Marine Lines, Inc., 90 S.Ct. at 1772, 1778 (1970).³

In *Moragne*, the Court rejected the common law rule against recovery for death in a maritime case, holding that a cause of action for death existed. The Court noted that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Moragne*, 90 S.Ct. at 1790. Similarly, "the ultimate rule adopted under § 1988 'is a federal rule responsive to the need whenever a federal right is impaired.'" *Robertson*, 98 S.Ct. at 1994, quoting *Moor v. County of Alameda*, 93 S.Ct. 1785, 1792 (1973). This Court has stated that a *federal* rule must be established that is responsive to the *federal* policies underlying § 1983. See, *Moor, supra*; *Robertson*, 98 S.Ct. at 1995. As such, it cannot

³The *Moragne* Court went on to explain that the lack of a "person injured" does not justify the harshness of the common law rule:

Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter. It is true that the harms to be assuaged are not identical: in the case of mere injury, the person physically harmed is made whole for his harm, while in the case of death, those closest to him - usually spouse and children - seek to recover for their total loss of one on whom they depended. This difference, however . . . does not seem to account for the law's refusal to recognize a wrongful killing as an actionable tort.

Moragne, 90 S.Ct. at 1778.

be said that the absence of a death remedy in the statutory framework of the Civil Rights Act of 1871 precludes the adoption of such a remedy where that remedy will effectuate the purposes of federally created rights.

Numerous lower federal courts, *see supra and Petitioner's main brief*, have held that the federal common law should be looked to in providing an adequate death remedy when reference to state law would restrict the remedies available. Moreover, this Court has articulated federal common law rules for damages to be provided in § 1983 cases. In *Smith v. Wade*, 103 S.Ct. 1625 (1983), this Court reiterated that punitive damages are available to § 1983 litigants despite the fact that the statutory language does not directly provide for such damages. The authority for punitive damages in *Smith* is general, without reference to any state law provision. The "deficiency" of § 1983 in failing to enumerate what categories of damages are awardable in § 1983 actions was not cured by the "borrowing" of state law. Instead, the Court laid down a uniform rule based upon the purposes of § 1983.⁴ The proper course in this case is to provide for the survivorship of § 1983 actions against Alabama municipalities in a manner that is responsive to the policies underlying the federal cause of action. The Court in *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala.), see discussion *infra*, provided such a remedy, the lower federal courts have provided such, and this Court should hold accordingly.

⁴Similarly, this Court in *Felder v. Casey*, 108 S.Ct. 2302 (1988), refused to apply a Wisconsin notice-of-claim statute that would have acted as a bar to a § 1983 action. The *Felder* Court held:

[T]he Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942).

Felder, 108 S.Ct. at 2313-14.

D. Section 1988 In No Way Mandates That State Law Be Applied To All Cases Where No Suitable Federal Rule Exists.

Defendant suggests that in every case where the civil rights acts are "deficient", or do not furnish suitable remedies, that state law, regardless of the consequences, should be applied. This Court has held otherwise. A three step test is to be applied in deciding the appropriate rule. *Burnett v. Grattan*, 104 S.Ct. 2924, 2928 (1984).

First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." If no suitable federal rule exists, courts undertake the second step by *considering* application of state "common law, as modified and changed by the Constitution and statutes" of the forum state. A third step asserts the predominance of the federal interest: Courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States.

Id. (emphasis added).

Application of state law may be "considered", but the federal interest predominates. *See, Casey*, 108 S.Ct. at 2307 ("A state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted . . ."). It is difficult to imagine a state law more inconsistent with the federal policies underlying § 1983 than one which totally insulates municipalities from liability.⁵ Defendant's construction effectively reads the last sentence of § 1988 out of the statute.⁶

⁵There is no question that municipalities are "persons" to whom the Civil Rights Act of 1871 applies. *Monell v. Dept. Of Social Svs. of N.Y.*, 98 S.Ct. 2018, 2036 (1978), *see infra*.

⁶By arguing that § 1988 mandates that state law be applied to § 1983 death actions without regard to its effect on the remedies available, defendant essentially argues that § 1988 mandates that

E. The Application Of The Alabama Wrongful Death Act To § 1983 Claims In A Manner That Would Cause Them To Abate Is Inconsistent With The Constitution And Laws Of The United States.

The policy behind the Alabama Wrongful Death Act, Ala. Code § 6-5-410 (1975), which is "to protect life, to prevent homicide, and to impose civil punishment on takers of life." *Geohagen v. General Motors Corp.*, 279 So. 2d 436, 439 (Ala. 1973). This is not *per se* inconsistent with the policies underlying § 1983. The inconsistency is with an application of § 6-5-410 that completely insulates Alabama municipalities from liability.

The test for determining whether the application of a state survivorship provision is inconsistent with federal law is "whether application of state law would be inconsistent with the federal policy underlying the cause of action under consideration. *Robertson*, 98 S.Ct. at 1995. The policies underlying § 1983 claims are "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Id.* An application of the Alabama Wrongful Death Act that causes *every* § 1983 death claim against a municipality to abate, cannot compensate or deter.

The only federal court directly passing on the issue, *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), stated that, "The wrongful death statute should not be held to foreclose the recovery of compensatory damages against the governmental entity in question, for such a result would be inconsistent with the policies underlying § 1983." *Weeks*, 649 F. Supp. at 1309. Defendant argues

entire state law causes of action be imported into the federal scheme. This concept has been rejected. "[W]e do not believe that the section, without *Moor*, was meant to authorize the wholesale importation into federal law of state causes of action." *Moor*, 93 S.Ct. at 1792-93.

that the *Weeks* Court held that awarding compensatory damages is only required under § 1983 for losses incurred by the decedent's survivors (Resp. Brief, p. 33). Defendant attempts to argue that the holding of the *Weeks* Court is that the compensatory damages claims of survivors survive, but not those of the decedent. That is not the case. The *Weeks* Court held that the *claim* of the decedent for compensatory damages survives, but that the *measure* of those damages would be the loss of income from the decedent, loss of companionship and consortium, and pain and suffering of the survivors. The argument that *Weeks* does not afford Plaintiffs the recovery sought is pure sophistry. It provides the exact remedy sought - compensatory damages.

While Mrs. Jefferson cannot be compensated for her injuries, the failure to provide a compensatory damages remedy in this case, given the interplay between the Alabama Wrongful Death Act and the decision of this Court in *City of Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2746 (1981) mandates a compensatory measure of damages. The federal policy in favor of compensation for harm resulting from constitutional deprivations was enunciated in *Carey v. Piphus*, 98 S.Ct. 1042 (1977). Damages are to be available to § 1983 litigants for actions "found . . . to have been violative of . . . constitutional rights, and to have caused compensable injury . . ." *Carey*, 98 S.Ct. at 1048. *Carey* went on to hold that "there is no evidence that Congress meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." *Carey*, 98 S.Ct. at 1048. The total elimination of § 1983 liability for Alabama municipalities where death results from the constitutional wrong decimates the ability of § 1983 to have the intended deterrent effect.

The Court in *Carlson v. Green*, 100 S.Ct. 1468 (1980), pursuant to the federal common law, created a compensatory remedy that would further the policies underlying

a federal *Bivens* action, and prevent the abatement of such an action by the application of an Indiana survivorship provision. *Carlson* 100 S.Ct. at 1474. The *Carlson* Court, as well as the lower federal courts, see *supra*, have held that a compensatory remedy is necessary to further the compensatory and deterrence policies of § 1983. Compensatory damages are allowed in death cases as it is "well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. *Bell v. Hood*, 66 S.Ct. 773, 777 (1946).

Lastly, Defendant suggests that the compensation of a decedent's estate for pain and suffering is a novel concept serving no legitimate end. That is hardly the case where thirty-two jurisdictions (as of 1975) have survival statutes or hybrid survival-wrongful death statutes allowing recovery for a decedent's conscious pain and suffering⁷.

Deterrence is one of the policies underlying § 1983. Similarly, § 1988 mandates that a remedy is to be provided in order to "punish offenses against law . . ." However, Defendant continues to maintain the untenable position that the total elimination of § 1983 death claims against Alabama municipalities does not undermine § 1983's stated goal of deterrence.

The reason that § 1983's official policy of deterrence would be severely undermined is that "Alabama municipalities and counties would know, in advance, that they would never be monetarily liable under § 1983 for acts which cause deprivations of constitutional rights as long

as the victims die." *Weeks*, 649 F. Supp. at 1305. In response to the obvious elimination of *any* deterrent affect on municipal defendants, the City asserts, at bottom,⁸ that damages under § 1983 would have no affect on the actions of municipal actors. If Defendant's assumptions that municipal actors would never contemplate illegal activity were true, the whole system of § 1983 damages should be disregarded. If it were not that illegal activity in violation of § 1983 is contemplated, there would be no need for § 1983 liability *at all*. Similarly, while it seems incredulous to civilized persons that one would kill rather than maim to avoid liability, the fact that all 50 states now have survival statutes clearly shows that death is to be remediated and deterred. See, *Van Beeck v. Sabine*

⁷6. S. Speiser, *Recovery for Wrongful Death*, § 14.8 (2d ed. 1975) cited in *Guyton v. Phillips*, 532 F. Supp. 1154 (N.D. Cal. 1981), identifies thirty-two jurisdictions as having survival statutes or hybrid survival-wrongful death statutes that allow recovery for a decedent's conscious pain and suffering prior to death.

⁸Defendant argues that in order to find that the Alabama Wrongful Death Act has even a marginal influence on the behavior of municipalities in Alabama, the Court would have to assume that Alabama municipalities (1) contemplate illegal activity in violation of § 1983; (2) are aware of the intricacies of the Alabama Wrongful Death Act and § 1983 remedial schemes; (3) would intentionally kill an individual or permit her to die . . . in order to avoid liability under Section 1983; and (4) would do so fully aware that they may still be subjected to liability for punitive damages in a state law action for wrongful death." (Respondent's Brief, p. 37). First, the fact that governmental entities do contemplate and implement illegal customs, policies, and procedures is the reason § 1983 liability has been extended to such bodies. See *Monell*, *infra*. If this Court had not decided there was a need for the tort-like remedy § 1983 provides, the statute would be obsolete. Second, if Respondent's argument is taken at face value, it would follow that we need not rely on any tort-based system, only the "clean hearts" of our municipal officers and employees. This defies common sense and our entire system of tort based liability, including § 1983 which "creates a species of tort liability." *Imbler v. Pachtman*, 96 S.Ct. 984, 988 (1976). This argument ignores the purposes for which § 1983 was enacted a remedy for "murder stalking about in disguise . . . , whippings and lynchings and banishment . . . visited upon unoffending American citizens . . ." *Berry*, 900 F.2d at 1501, quoting Cong. Globe 42nd Cong., 1st Sess. 236 at 374 (1871).

Towing Co., 300 U.S. 342, 346 (1937) ("there is not a state of the Union in which a remedy is lacking").

Defendant argues that § 1983 death liability should not be extended to municipalities in Alabama because of the availability of other remedies, including state law claims. The availability of a state law claim has no bearing on the availability of a § 1983 action.

It is no answer that the state has a law which it enforced would give relief. The federal remedy is supplementary to the state remedy . . .

Monroe v. Pape, 81 S.Ct. 473, 482 (1961). The unique federal remedy, *see Felder, supra*, is unaffected by the existence of a state remedy. This is particularly true where, as stated in Petitioner's main brief, Alabama state law provides only a severely limited remedy.⁹

Similarly, the availability of a § 1983 claim against individuals does not obviate the need for a significant deterrent to official misconduct by the municipality. In *Monell v. Department of Social Services*, 98 S.Ct. 2018 (1978), this Court held that municipalities could not be found liable for the individual, discreet acts of its employees under § 1983. The Court rejected traditional *respondeat superior* liability for municipal officials. *Monell*, 98 S.Ct. at 2036. The *Monell* Court, however, did reiterate that municipalities are among those persons to whom the Civil Rights Act of 1871 applies where, ". . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 98 S.Ct. at 2035-36.

⁹The Alabama Wrongful Death Act claim in this case is wholly inadequate. It is inadequate because recovery on such state law claims against municipalities in Alabama is capped at \$100,000.00 by Ala. Code § 11-93-2 (1975). Moreover, the state wrongful death claim does not provide any of the other relief afforded successful § 1983 litigants.

Section 1983 is appropriate to impose municipal liability for an unconstitutional policy that "although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law." *City of St. Louis v. Praprotnick*, 108 S.Ct. 915, 926 (1988). However, if only individual liability is available for constitutional deprivations by its employees and officials, there would be no incentive to put into effect policies to avoid § 1983 liability.

The Court has recognized the need for a damages remedy against municipalities, in addition to individuals, stating:

Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials . . .

Owen v. City of Independence, MO, 100 S.Ct. 1398, 1416 (1980). If municipalities are insulated from § 1983 death claims, the deterrent effect on city policymakers where death occurs will be lost.

F. The Application Of Federal Common Law To The Survivorship Question Serves The Purposes Of § 1983 Actions.

In *Carlson*, if the relevant Indiana statute were applied to *Bivens* action, the jurisdictional limit of the federal court would not have been met, and the case would have been dismissed. The issue presented was: "Is survival of the cause of action provided by federal common law or

by state statutes?" *Carlson*, 100 S.Ct. at 1471. The Court spoke clearly.

... Whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.

Carlson, 100 S.Ct. at 1474. Similarly, where blind reference to the Alabama Wrongful Death Act would abate *all* § 1983 death actions against municipalities in Alabama, the federal common law should be applied.

This Court, as well as the lower federal courts, have routinely relied upon the federal common law to provide adequate remedies to § 1983 litigants. In *Felder v. Casey*, *supra*, the Court held that "a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted." It is preempted by federal common law. In assuring that individuals whose federal constitutional or statutory rights are abridged may recover, *see Felder*, 108 S.Ct. at 2307, this Court has not hesitated to apply the federal common law. This Court held in *Sullivan*, "[A]s we read § 1988, . . . both federal and state rules on damages may be used, whichever better serves the policies expressed in the federal statutes." *Sullivan*, 90 S.Ct. at 406. Similarly, the Court in *Bell*, held that where a federal statutory right is involved, "federal courts may make use of any available remedy to make good the wrong done." *Bell*, 66 S.Ct. at 777.

Access to federal common law to provide a proper § 1983 remedy is not limited. It is not even limited by the very statute Defendant holds sacrosanct in this matter, 42 U.S.C. § 1988. While § 1988 does refer civil rights litigants to state law, it does so *only* "so far as the same is not inconsistent with" the federal statutory rights the Civil Rights Acts were enacted to remediate in the first place. An application of state law that would eliminate § 1983

death action effectively eliminates this statutory language.

The absence of a uniform, statutory, § 1983 survivorship scheme does not evidence any hostility toward such a remedy. This Court has given § 1983 "the effect its terms require, as affording redress for violations of federal statutes, as well as of constitutional norms. *Livadas v. Bradshaw*, 114 S.Ct. 2068, 2083 (1994), citing *Maine v. Thiboutot*, 100 S.Ct. 2502, 2504 (1980). Section 1983 does not fail to provide a remedy where Congress has not specifically enumerated the procedural vehicle for doing so. The law is that "apart from . . . *exceptional cases*, § 1983 remains a generally and presumptively available remedy for claimed violations of federal law." *Livadas*, 114 S.Ct. at 2083, citing *Dennis v. Higgins*, 111 S.Ct. 865, 868 (1991) (emphasis added). Simply put, the lack of a statutorily provided avenue of survivorship has no bearing on what remedies are available under § 1983.

The lower courts managed to fashion a federal remedy to remediate the federal rights protected by § 1983, *see supra*, without the explosion of litigation feared by Defendant. This Court also undertook to do so in *Carlson*. The *Carlson* Court recognized the need for uniformity in remedy rather than reliance upon the "vagaries of the laws of the several states . . ." *Carlson*, 100 S.Ct. at 1474

. . . uniformity cannot be achieved if courts are limited to applicable state law. . . The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred.

Id. Similarly, § 1983 municipal liability should not depend upon where the violation occurred.

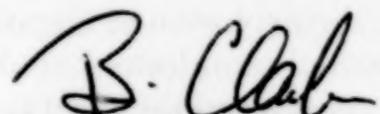
Plaintiffs do not ask this Court to undertake "the wholesale creation of a federal common law wrongful death and survival regime for § 1983" (Respondent's Brief, p. 44). Plaintiff seeks only to follow the statutory

directive of § 1988, and apply Alabama law so far as it is not "inconsistent with the Constitution and laws of the United States." The United States District Court for the Southern District of Alabama in *Weeks* was able to fashion a simple, workable remedy in line with the mandate of § 1988 and policies underlying § 1983. There is no reason to believe that such a remedy would spur additional litigation. The simple rule, articulated in *Weeks* and echoed throughout the country is that the application of a state survivorship provision that would, across the board, cause a § 1983 claim against a governmental entity to evaporate on death would be "inconsistent with the policies underlying § 1983." *Weeks*, 649 F. Supp. at 1309.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Alabama should be reversed.

RESPECTFULLY SUBMITTED,



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